Elliott Turbomachinery Co., Inc. *and* Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC. Case 9–CA–30582

December 18, 1995

DECISION AND ORDER

BY MEMBERS BROWNING, COHEN, AND TRUESDALE

On March 31, 1994 Administrative Law Judge John H. West issued the attached decision. The Respondent filed exceptions and a supporting brief, and the General Counsel and the Charging Party each filed answering briefs. The Respondent also filed a reply brief.[1]

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,[2] and conclusions and to adopt the recommended Order.

We adopt the judge's findings that the Respondent violated Section 8(a)(5) and (1) of the Act as alleged. The violations found center upon the Respondent's failure to bargain in good faith with the Union over its decision to relocate its manufacturing operations from Dayton to Columbus, Ohio.

In early 1993, the Respondent requested midterm negotiations with the Union over proposed contractual changes that it admitted could not be implemented under the current bargaining agreement. The Respondent proposed ''team cells,'' the implementation of which, as detailed in the judge's decision, would violate the contract's seniority and job classification provisions. The Respondent stated that if the Union tried to bargain away from the ''team cell'' concept, the Company would relocate to Columbus, but if the Union accepted the Respondent's proposals in their entirety, the manufacturing operations would remain in Dayton. A mere 4 days after the Respondent presented its proposals—ostensibly for the purpose of implementing contractual changes that would preclude the need to relocate operations—the Respondent informed the Union by letter that it was planning to close the Dayton operations in 2 months and relocate to Columbus. Thereafter, the Union made repeated requests to bargain over the relocation decision, but the Respondent maintained that it had a contractual right unilaterally to relocate its manufacturing operations and that it did not want to negotiate away from the plan. Thus, as the judge found, the Respondent ''peremptorily foreclosed further negotiations'' and presented its relocation decision to the Union as a fait accompli.[3]

In finding the violations alleged, we agree with the judge, for the reasons set forth in his decision, that the Respondent's relocation decision was a mandatory subject of bargaining under *Dubuque Packing*, above. We also adopt the judge's finding that the Union did not waive its right to bargain about the relocation decision by agreeing to the contractual management-rights and severance pay provisions and to the zipper clause.[4] The management-rights provision in the parties' 1991 collective-bargaining agreement states:

> Subject to the provisions of this Agreement, the Union hereby recognizes that the management of the plant and direction of the working forces, including the right to direct, plan, control plant operations, establish and change working schedules, the right to hire, transfer, suspend or discharge employees for cause, layoff employees because of lack of work or for other legitimate reasons, the right to introduce new or improved methods or facilities or to manage the properties, is exclusively vested in the Company. *To decide location of its plant, and to relocate the same*; to permanently discontinue the conduct of its business and operations. [Emphasis added.]

The Respondent contends that because the purpose of a management-rights provision is to enumerate management's rights, the above-cited provision should be construed as clearly and unambiguously vesting it with an unqualified right to relocate the plant. Alternatively, the Respondent maintains that by unilaterally relocating from Dayton to Columbus, it ''acted in accord with its reasonable construction of the agreement.'' Under settled Board law, the critical question, however, is not ''whether such a right might reasonably be

[1] The Council on Labor Law Equality filed a motion requesting leave to file an amicus brief concerning the Board's application of *Dubuque Packing Co.*, 303 NLRB 386 (1991), enfd. in relevant part sub nom. *Food & Commercial Workers Local 150-A v. NLRB*, 1 F.3d 24 (D.C. Cir. 1993), cert. granted 114 S.Ct. 1395 (1994), cert. dismissed 114 S.Ct. 2157 (1994), to determine whether relocation decisions are mandatory subjects of bargaining. The General Counsel moved to strike the brief as untimely filed. The General Counsel's motion to strike is denied, and the Board accepts the amicus brief.

[2] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[3] See *Mercy Hospital of Buffalo*, 311 NLRB 869, 873 (1993).

[4] Consistent with the majority opinion in *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), and contrary to our dissenting colleague, we adhere to the clear-and-unmistakable waiver standard and decline to apply a less rigid ''contract coverage'' test to determine whether an employer may invoke contract language as a defense to an alleged failure to bargain over changes in mandatory subjects of bargaining. The Supreme Court has upheld the clear and unmistakable waiver standard when discussing the impact of a contractual provision on the waiver of a statutory right. *Metropolitan Edison Co. v. NLRB*, 460 U.S. 693, 708 (1983).

inferred from the management-rights clause; it is whether that interpretation is supported by 'clear and unmistakable language.'''[5]

Contrary to the Respondent's contentions, we agree with the judge that the above-quoted provision is ambiguous with respect to, inter alia, its right to relocate the plant. We note that the language addressing the Respondent's right ''[to] decide the location of its plant, and to relocate the same'' is omitted from the immediately preceding sentence, which enumerates the rights that the agreement exclusively vests in the Respondent. Instead, it is part of a separate and incomplete sentence at the end of the provision. Thus, the pertinent contract language presents two plausible alternatives relevant here: either the omission of relocation from the list of the rights the contract vests solely in the Respondent was an error, or the parties intended that the new sentence beginning after the enumeration of rights introduce a new idea and that the rights named are to be treated differently than those listed before, i.e., they are not exclusively reserved to the Respondent. The last partial sentence of the management-rights provision, then, can reasonably be interpreted as open to at least two plausible interpretations, including withholding from management of the unilateral right to relocate the plant.[6]

The judge further found, and we agree, that the parties' history of bargaining about the management-rights provision fails to clarify the ambiguity or to demonstrate that the Union waived its right to bargain about the relocation decision. During negotiations in 1984, the parties agreed to eliminate the following as the final sentence in the management-rights clause: ''Before final decision to discontinue the conduct of its business and operations, the Union will be advised and discussions held.'' The pertinent language plainly concerns the complete discontinuance of a business and not, as here, the relocation of a portion of the operations.[7] Moreover, the judge credited the testimony of the Union's negotiator, Ronto, that during the 1984 negotiations, the Respondent's representatives indicated to the Union that the ''discuss'' language in the agreement was redundant because the Respondent was obligated in any event to meet with the Union and discuss any discontinuance of operations. For these reasons, we find that the bargaining history does not establish that the parties ''fully discussed and consciously explored'' the Union's statutory bargaining rights regarding plant relocations or that the Union ''consciously yielded or clearly and unmistakably waived its interest in the matter.''[8]

The contract includes a zipper clause that precludes bargaining about those matters already agreed to in the collective-bargaining agreement.[9] The clear and unmistakable waiver test applies equally to alleged waivers contained in zipper clauses.[10] We have concluded that the parties' intent with respect to the Respondent's retention of the unilateral right to relocate cannot be discerned with certainty. Under the circumstances, we will not construe the contractual zipper clause as precluding bargaining concerning plant relocations.[11]

Even applying the less rigorous ''contract interpretation'' standard our dissenting colleague advances, we cannot agree with him that the parties intended to recognize relocation as an unrestricted management right. In interpreting a contract, the parties' actual intent is always given controlling weight.[12] In order to determine that intent, it is necessary to examine both the contract language itself and relevant extrinsic evidence, including bargaining history. Id. This is not to say, however, that the Board interprets collective-bargaining agreements in a vacuum, solely in accordance with ''abstract definitions unrelated to the context in which the parties bargained and the basic regulatory scheme underlying that context.''[13] Rather, ''collective-bar-

[5] *Owens-Brockway Plastic Products*, 311 NLRB 519, 525 (1993) (emphasis added).

[6] See *American Telephone Co.*, 309 NLRB 925, 927 (1992) (letter included as part of bargaining agreement did not constitute a waiver of the union's right to bargain about subcontracting where the letter could be construed as permitting the employer to subcontract unit work except in specified layoff situations, but could also be reasonably interpreted to require the employer to discuss with the union all plans to subcontract).

[7] In the same vein, the contract's severance pay provision concerns permanent plant closures and therefore does not establish that the Union waived its right to bargain about plant *relocations*.

[8] *Dubuque Packing*, 303 NLRB at 397. See also *Reece Corp.*, 294 NLRB 448, 450–451 (1989).

We also reject the Respondent's contention that the judge found that the management-rights provision could not waive the Union's right to bargain about plant relocations because the parties did not negotiate about the provision during negotiations for the 1991 contract, thus applying the ''reaffirmation requirement'' criticized by the court in *Gannet Rochester Newspapers v. NLRB*, 988 F.2d 198, 203–205 (D.C. Cir. 1993), denying enf. 305 NLRB 906 (1991). We have found, as discussed above, that the judge appropriately considered the plain language of the management-rights provision and the parties' bargaining history in evaluating the Respondent's waiver defense.

[9] The zipper clause provides in pertinent part that the parties have agreed ''that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement.''

[10] *Michigan Bell Telephone Co.*, 306 NLRB 281, 282 (1992).

[11] See *Associated Services for the Blind*, 299 NLRB 1150, 1151 (1990), in which the Board found that a contractual zipper clause containing the same ''referred to or covered [by]'' language as the zipper clause here did not constitute a waiver of the union's right to bargain about the specifics for implementing a procedure for bumping unit employees from their jobs when the parties had agreed to a contractual ''bumping by seniority'' provision, but had not discussed or explored its implementation.

The Board in *Associated Services* also noted, at fn. 8, that the normal function of a zipper clause is to maintain the status quo during the life of a contract, and not to facilitate unilateral change.

[12] *Electrical Workers IBEW Local 1395 (Indianapolis Power) v. NLRB*, 797 F.2d 1027, 1036 (D.C. Cir. 1986).

[13] *NLRB v. C & C Plywood Corp.*, 385 U.S. 421, 430 (1967).

gaining agreements must be read in light of the realities of labor relations and considerations of Federal labor policy.''[14]

Turning to the language of the contract, we find, contrary to the dissent, that the fact that the management-rights provision does not tie plant relocation to the phrase ''exclusively vested in the Company'' raises concerns beyond faulty grammatical placement by creating an ambiguity as to the parties' intent regarding plant relocations.[15] Additionally, even if the relocation language appeared in the preceding sentence, that sentence is itself qualified by the introductory phrase stating that the exercise of the rights enumerated therein is ''[s]ubject to the provisions of this Agreement.''

We also disagree with the dissent's reliance on article 20, the contract's severance pay provision. Our dissenting colleague characterizes the Respondent's relocation as resulting in a ''permanent and total closure of the manufacturing operation of the old facility.'' Contrary to the dissent, we refuse to equate the Respondent's relocation of its manufacturing operations from Dayton to Columbus with the permanent and total closure of the Dayton operations. To do so would enable employers to evade their bargaining obligations by engaging in quasi-plant closures. In this regard, we note that although production ceased at Dayton, support functions including sales, marketing, finance, purchasing, and engineering remained at the Dayton facility. We therefore disagree with the dissent's position that article 20 of the contract, concerning severance pay and applicable on its face to permanent plant closures, covers or is applicable to the unilateral relocation of the Respondent's manufacturing operations here.

Moreover, although the dissent contends that the severance pay provision grants the Company the sole right to determine whether to permanently close the plant, the bargaining history of the management-rights provision suggests the contrary. As discussed above, the judge credited the testimony of the Union's negotiator Ronto that during the 1984 negotiations the Respondent's position was that the last sentence in the 1981 management-rights provision requiring the Respondent to discuss with the Union any proposed *discontinuance* of operations—which was ultimately deleted from the 1984 contract—was redundant because another provision of the agreement (art. 7, sec. 2) placed such an obligation on the Respondent. An employer's decision to close part of its business, unlike an employer's decision to relocate its operations, is generally not a mandatory subject of bargaining.[16] If, as the bargaining history suggests, the contract imposed on the Respondent a duty to consult with the Union on a permissive subject of bargaining (discontinuing operations at Dayton), then it could well be argued that the contract required the Respondent to consult with the Union on a mandatory subject of bargaining (relocating the Dayton operations to Columbus).

Apart from this limited information concerning the parties' bargaining history, none of the standards for interpreting ambiguous contract language such as past interpretations, parol evidence, or knowledge of which party drafted the language is present here to clarify the parties' intent regarding a relocation of operations. If a contract is clear and unambiguous, it must be applied in accordance with its terms. When, as here, the contract is ambiguous, we find applicable the court's statement in *Electrical Workers IBEW Local 1395 v. NLRB* that collective-bargaining agreements should be read in light of the ''realities of labor relations and considerations of federal labor policy.''[17]

We have found that the Respondent's relocation decision is a mandatory subject of bargaining. Therefore, requiring the Respondent to bargain over that decision is ''responsive to the central purposes for which the Act was created: promoting labor peace through collective bargaining over those matters suitable for negotiation where there is a general duty to recognize and bargain with a labor organization.''[18] Under the circumstances here, when there are two equally plausible interpretations of ambiguous contract language, one granting management an unrestricted right to relocate the plant and one requiring management to first consult with the Union, we find that considerations of Federal labor policy militate in favor of the latter interpretation. Accordingly, we find, contrary to our dissenting colleague, that even under a ''contract interpretation'' analysis, the Respondent was obligated to bargain over its decision to relocate the plant. Consequently, its failure to do so violated Section 8(a)(5) and (1) of the Act.

REMEDY

We adopt the judge's recommendation that the Respondent be ordered to reestablish its manufacturing operations at its Dayton, Ohio facility. At the compliance stage of this proceeding, the Respondent may introduce evidence, if any, that was not available prior to the unfair labor practice hearing, to demonstrate that

[14] *Electrical Workers IBEW Local 1395 v. NLRB*, 797 F.2d at 1033.

[15] Contrast *Gratiot Community Hospital v. NLRB*, 51 F.3d 1255, 1261 (6th Cir. 1995), in which the court, denying enforcement in pertinent part to 312 NLRB 1075 (1993), found that the employer's unilateral elimination of a special shift program was lawful when the contractual language was ''*clear and unambiguous* in granting authority to the Hospital to determine the number of shifts . . . in the [special shift] program'' (emphasis added).

[16] *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981).

[17] 797 F.2d at 1033.

[18] *Dubuque Packing*, above, 303 NLRB at 392.

restoration of the manufacturing operations at Dayton would be unduly burdensome.[19]

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Elliott Turbomachinery Co., Inc., Dayton and Columbus, Ohio, its officers, agents, successors, and assigns, shall take the action set forth in the Order.

MEMBER COHEN, dissenting.

My colleagues conclude that the Respondent was obligated to bargain about the decision to relocate the plant. In my view, the contract permitted the Respondent to relocate without bargaining. I therefore dissent.

As my colleagues concede, the contract deals with the issue of whether Respondent could relocate without bargaining. As they see it, the problem is that the contract does not *clearly resolve* the issue. They then proceed to apply a ''waiver'' analysis. They conclude that the contract does not clearly waive the right to bargain.

I would not apply a ''waiver'' analysis. As expressed in my dissent in *Exxon Research & Engineering Co.*, 317 NLRB 675 (1995), if the contract covers a subject, the issue is not one of waiver; rather, the issue is one of interpreting those contract terms. I therefore now turn to the contract terms.

First, I note that at least two provisions of the contract deal with the subject involved herein (i.e., whether the Union had a right to bargain about relocation). Article III of the contract (management's rights) speaks of the right ''to decide location of its plant, and to relocate the same.'' In addition, article 20 of the contract gives the Company ''sole judgment'' to decide whether to permanently close a plant. As discussed below, there can be legitimate questions as to what these provisions mean. There can be no question, however, but that these contract provisions cover or at least refer to the matter involved herein. In these circumstances, article 16, section 1 of the contract is instructive. It provides that if ''a subject or matter [is] referred to or covered by this Agreement,'' neither party ''shall be obligated to bargain collectively'' with respect thereto for the life of the agreement. In the instant case, the subject matter herein was ''covered'' in the contract. Thus, there was no obligation to bargain further with respect thereto.

Further, article III of the contract affirmatively supports the view that there is no duty to bargain in this case. As noted, that provision is captioned ''Management's Rights,'' and it expressly lists the following: ''To decide location of its plant, and to relocate the same.'' Concededly, the quoted phrase appears separately, after a sentence that says that ''management of the plant or direction of the working forces . . . is exclusively vested in the company.'' Thus, from a strictly grammatical standpoint, the right to relocate is not directly tied to the phrase ''exclusively vested in the company.'' It is a cardinal rule of contract construction, however, that every word of a provision is to be given some meaning. The words ''to relocate the plant'' are listed in an article entitled ''Management Rights.'' If the parties did not intend ''relocation'' to be a management right, they would not have placed that phrase in that article. Thus, a reasonable inference is that the parties recognized that relocation is a management right. The grammatical placement of the phrase within the article does not, by itself, destroy the inference.[1]

Article 20 of the contract gives further support to my view. That provision says that the decision to ''close permanently a plant'' is a matter vested ''in the sole judgment of the company.'' My colleagues say that a permanent closure of a plant is different from a relocation. In the instant case, however, the relocation resulted in a permanent and total closure of the manufacturing operation of the old facility.[2] The relocation and the permanent closure were one and the same. Accordingly, under article 20, that decision was vested ''in the sole judgment of the company.''

As noted, the plant closure was part and parcel of a relocation. It was *not* a discontinuance of the business. Thus, the argument of my colleagues (that the parties agreed to discuss a discontinuation of the business) is irrelevant to the instant case. This case involves a relocation of operations, i.e., a *continuance* of the operations at another facility. The relocation of operations is expressly covered by the phrase that gives the Company the right ''to decide location of its plant and to relocate the same.''[3]

[19] See *Lear Siegler, Inc.*, 295 NLRB 857, 862 (1989).

[1] My colleagues note that the management rights are ''subject to the provision of the agreement.'' There is nothing in the agreement, however, that obligates the Respondent to bargain about a relocation.

[2] The manufacturing operation was coextensive with the contract unit. Thus, the Union's agreement, in the contract, that the Respondent could shut down the plant was essentially an agreement that the Respondent could shut down the contract unit. That is precisely what Respondent did. The fact that Respondent chose to retain a few nonunit positions is essentially beside the point.

[3] The fact that the parties may have agreed to discuss a discontinuation of the business does not necessarily mean that they have agreed to discuss or bargain about a relocation. The contract here shows that they did *not* so agree.

Under each of the provisions, and under all of them collectively, I conclude that there was no duty to bargain in this case.[4]

Deborah R. Grayson, Esq., for the General Counsel.
Robert J. Brown, Esq. and *Teresa D. Jones, Esq. (Thompson, Hine and Flory)*, of Dayton, Ohio, for the Respondent.
Frank Forgione, of Willowick, Ohio, for the Charging Party.

[4] My colleagues say that there are ''two equally plausible interpretations'' of the contract. I disagree. As set forth above, I believe that all of the relevant contract provisions support the proposition that the relocation involved herein is a management right.

I do not pass on whether the decision was a mandatory subject under *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981), or *Dubuque Packing Co.*, 303 NLRB 386 (1991). Even if it was, the contract privileged the Respondent's actions.

DECISION

STATEMENT OF THE CASE

JOHN H. WEST, Administrative Law Judge. The charge was filed by Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC (the Union) on April 12, 1993. A complaint was issued on June 3, 1993, and an amended complaint was issued on October 19, 1993, alleging that Elliott Turbomachinery Company, Inc. (Respondent) engaged in unfair labor practices within the meaning of Section 8(a)(1) and (5) of the National Labor Relations Act (the Act) by refusing to furnish the Union with information requested by it, by notifying the Union of its intent to discontinue its manufacturing operations at its Dayton, Ohio facility and subsequently relocating that operation to Columbus, Ohio, without prior notice to the Union and without affording the Union an opportunity to bargain with respect to this conduct, and by refusing to bargain with the Union about operational changes that were initially proposed by Respondent at an March 4, 1993 meeting. Respondent denies violating the Act.[1]

A hearing in this case was held before me in Dayton on November 9 and 10, 1993. On the record, including the demeanor of the witnesses, and after due consideration of the briefs filed by the General Counsel and the Respondent, I make the following

[1] Additionally Respondent, in its answer to the amended complaint, asserts that its decision to discontinue its manufacturing operation in Dayton, Ohio, and to relocate some of those operations in Columbus, Ohio, was not a mandatory subject of bargaining; that the Union through specific provisions of the labor agreement and through the special severance benefits negotiated as part of that labor agreement, waived any right to bargain, discuss, or in any way be involved in any decision by the Company to discontinue and to relocate some of the operations; and that the Union, by its conduct on March 4 and 8, 1993, in its meetings with the Company and by its conduct on March 7, 1993, is estopped from making any claims with regard to bargaining about the Company's decision to discontinue its Dayton operation.

FINDINGS OF FACT

I. JURISDICTION

Respondent, a corporation, was engaged in the production of industrial tools at its facility in Dayton. The complaint alleges, the Respondent admits, and I find that at all times material, Respondent has been an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act, and the Union has been a labor organization within the meaning of Section 2(5) of the Act.

II. FACTS

The Union has had collective-bargaining agreements with Respondent and its predecessor, the Gustav Wiedeke Company,[2] at Dayton for over 35 years. General Counsel's Exhibit 2(a)–(k). The most recent agreement was effective from June 21, 1991, through June 24, 1995. (G.C. Exh. 3.)[3]

On March 3, 1993 John Prah, who is the shop chairman of the employees' bargaining committee, telephoned Velmer Burton, who is a business representative with the Union, and advised Burton that the Respondent had requested a meeting on March 4, 1993, at the Company at 2 p.m. Prah speculated that it might involved layoffs.

On March 4, 1993, when Burton arrived at Respondent's facility he was directed to go to the Hampton Inn. There he and the employee bargaining committee members met with the following representatives of Respondent: Chuck Dunlevy, who is Respondent's labor relations manager, Bob Columbus, who was Respondent's operations manager at Dayton and now holds that same position at Columbus, and Allen Chenoweth, who was the plant superintendent at Respondent's Dayton facility. Dave Horning and Carl Chaney are also on the employees' bargaining committee. Burton testified that Dunlevy started the meeting ''saying that the company couldn't afford to be losing money anymore and that he was going to present a program''; that Dunlevy said that the Company had three options, namely, maintain the status quo, create a team cell concept and a team work environment or close the plant down; that Dunlevy called the plan he presented a Profitability Assurance plan; that the plan was presented showing slides, see General Counsel's Exhibit 4, with an overhead slide projector, and with Columbus and Chenoweth doing the narration; that Columbus said that the Company was going to reduce the number of parts it manufactured; that Chenoweth said that the teams would handle their own problems within the teams and the team leader would decide whether they actually had a problem; that this approach would be contrary to the labor agreement and the right to air grievances or representation; that it was indicated that the team would decide who would be in the group, who would stay in the group, and who would leave the group; that Columbus said that the Company was going to take the 19 classifications on page 63 of the current labor agreement and reduce them to 1 classification, namely, flexible machin-

[2] Apparently Respondent purchased the business in 1969.

[3] The agreement called for a 3-percent raise in 1991, a 3-percent raise in June 1992, a 3-percent raise in June 1993, and a 4-percent raise in the last year of the contract.

ist;[4] that to qualify for the flexible machinist position an applicant must successfully complete a skill level/compatibility test conducted by an independent testing firm to determine the applicant's ability/aptitude to successfully function in an empowered, flexible, work team environment; that it was indicated that the Company was going to permit even the foremen to be tested for these jobs; that it was indicated by Columbus that with the flexible machinist approach all shop supervision positions would be eliminated; that there were not really a lot of questions following the presentation because the Company's plan was a total surprise; that Dunlevy said that the Union and the employees had to accept the plan as is and they should not try to negotiate away from it or the Company would close the plant down; that Dunlevy said that ''more or less you're going to take this plan but, we're going to let you—even though the employees would be losing their representation and stuff we could still get our dues and recognition''; and that the parties agreed to meet again on March 8, 1993. On cross-examination Burton testified that during the March 4, 1993 meeting the comment was made that the Company lost money 9 out of the last 10 years; that Dunlevy said, ''[W]e're not here to ask for wage and benefit concessions''; and that the Union was told by the company representative ''don't try to bargain away from the concept of the plan.''

Regarding the March 4, 1993 meeting, Columbus testified that the Company's chief negotiator during the involved negotiations was Dunlevy; that he, Columbus, and Chenoweth, who was the note taker, also attended the negotiations; that the purpose of that meeting was to present the concept, to ask the Union to determine if they could accept that concept, and if the answer was yes, then proceed with negotiations to determine if the concept could be implemented in Dayton; that if the answer was no, the Company would finalize the closing decision and relocate the plant; that Dunlevy made opening and closing statements, Respondent's Exhibit 1, respectively, Appendices A and B hereto; that in terms of presentation, the company representatives followed exactly the text; that company representatives were asked if the employees would have to give up seniority, if they could provide a copy of the 60-day notice, if current management people would be eligible to go on the floor as machinists and if it was necessary to get the membership to agree to the plan before the March 8, 1993 meeting; that regarding the last question described above, the Union was advised that it was not necessary but the Company wanted to know if the Union was willing to accept the concept as a basis for negotiation; that Respondent's basic market for its tools, which are maintenance tools used in boilers, condensers, and heat exchanges, was disappearing because of new technology in these areas; that in 1986 the Company had sales of over $10 million but in 1992 its sales were just under $7.3 million; that the Company proposed taking 43 bargaining unit people to 16 with no supervision; that the Company was not proposing any wage- or fringe-benefit concessions; that the Union was told that the Company was looking at a higher rate of pay for the machinists; and that at this point in time the Company, if it was going to close the Dayton facility, had selected a site in Columbus for relocation. On cross-examination Columbus further testified that Respondent could not implement its plan under the collective-bargaining agreement in effect at the time because of the seniority language in the contract and the sections relating to job classifications; that it was necessary to go outside the bargaining unit to fill some of the flexible machinist positions; that to avoid having the Dayton manufacturing operation close, the Union would have had to accept the concept of the Respondent's plan as presented on March 4, 1993; that once the Union accepted the concept there were parts of the Respondent's plan that were open to discussion in view of the fact that Respondent did not open the Columbus plant with machines on wheels and there was a second classification, namely, shipping assembly; that indirect labor, which he described as leased or temporary employees, was something Respondent believed could be a negotiable item; that while the Union had to accept the cell concept, it did not have to accept the number of cells, namely, three; that the Union had to accept the flexible machinist concept, the testing, and the elimination of shop supervision; that if the Union had accepted these concepts, the work would have remained in Dayton and in his opinion, the operation could have been profitable in Dayton, especially because it was a much less expensive option; that indirectly one of the impediments to profitability at Dayton was the number of employees it took to manufacture parts and the key element to Respondent's plan was to eliminate supervision; and that while Respondent believed that the agreement it had with the Union gave it the right to close the Dayton manufacturing operation, it decided to present the plan to the Union to see if it would accept it.

Dunlevy testified that he read the opening and closing statements verbatim from the text at the March 4, 1993 meeting. Appendices A and B attached hereto.

On March 5, 1993, Burton telephoned his directing business representative, John Nickell, and told him about the above-described March 4, 1993 meeting, indicating that ''the company had made the statement they had lost money nine out of the last ten years.'' According to Burton's testimony, Nickell said the Company would have to show its records if it claimed it was losing money. Nickell told Burton that Nickell would attend the March 8, 1993 meeting with the company representatives. Nickell corroborates Burton's testimony regarding their March 5, 1993 conversation.

On March 7, 1993, Burton telephoned Columbus and told him that Nickell would be at the March 8, 1993 meeting. Burton testified that he asked Columbus, during this conversation, why the Company had blindsided the Union and the employees and Columbus replied that ''its easier for the company to go this way than it is to just tell the people [that] they're moving.'' Regarding this March 7, 1993 telephone conversation, Columbus testified that Burton said he did not know how the Union could accept any part of the Company's plan; that he assured Burton that it was not a ploy to gain concessions; and that he made notes, Respondent's Exhibit 2, of the conversation. Columbus' notes of the con-

[4] Slide 3A of G.C. Exh. 4 indicates that the Company would implement the use of part-time co-op students in conjunction with hourly personnel. At the time of this meeting Respondent had 42 employees. As pointed out by Burton, the work that could not be handled by the 16 flexible machinists that Respondent proposed to use would be handled by part-time co-op students even though employees with seniority would be laid off. Permission to use co-op students was negotiated out of the 1991 collective-bargaining agreement.

versation indicate that he told Burton during this conversation that the Company lost money 9 out of the last 10 years.

On March 8, 1993, Burton and Nickell met with the employees' bargaining committee members before they met with the company representatives at 2 p.m. At the 2 p.m. meeting Dunlevy, Columbus, and Chenoweth represented the Company. In addition to Nickell and Burton, Prah and Committeemen Horning and Paul Chaney attended the meeting. Burton testified that Nickell, at the outset of the meeting, questioned the company representatives present about their statements that the Company lost money 9 out of 10 years and he asked to see the Company's records; that Dunlevy said that he was not going to show the records because the Company was not really asking for concessions in wages; that Nickell then said, ''[W]hen you reduce 44 people down to 16, certainly that's a concession''; that when Nickell asked why would the company have to test an employee who has already been doing the job for a number of years Dunlevy said ''[W]e're sticking to the plan . . . don't even try to change it''; that it was indicated that the testing was to be done by Psychological Services of Pittsburgh (P.S.P.); that he did not believe that any company representative at this meeting specifically proposed to change any part of the bargaining agreement; that Dunlevy said that he ''was not going to change the concept of the plan and don't try to bargain away from it''; that during the 2 p.m. meeting Nickell orally presented eight questions that were drawn up during a caucus of the union representatives and committee members, General Counsel's Exhibit 5;[5] that while the company representatives indicated in response to one of the questions that the hourly rate for the flexible machinist would be higher than what machinists received under the 1991 collective-bargaining agreement, it was indicated that the Company would get back to the Union with the information requested about the hourly rate; that it was indicated to the company representatives present that the information was needed by the Union so that it could intelligently negotiate with the Company; that when company representatives mentioned a meeting the next day Nickell said that it would not do any good to meet if the Company could not provide the information the Union sought; that the company representatives present were told that the union representatives would be meeting with the membership on March 13, 1993, to tell them what the Company was proposing; that he and Nickell said that they would be at the Galt House in Louisville, Kentucky, on March 17, 18, and 19, 1993; that Dunlevy said that he also had commitments for those days; that the parties discussed the possibility of meeting on March 15 or 16, 1993; and that the meeting ended with the understanding that after the meeting with the membership on March 13, 1993, Burton, ''was to get back with Columbus to try to set up a meeting, if possible, to let him know some information.'' On cross-examination, Burton testified that during this meeting Dunlevy said that the Company would not furnish the financial information because it was not asking for concessions; and that Dunlevy wanted to meet the next day but that Nickell informed Dunlevy that he needed the information first so that the union representatives could meet with the membership and it would not make any sense for the Union and Company to meet until the Company could answer the Union's questions. On redirect, Burton testified that he was very sure that Columbus made a statement that the Company was losing $1 million this year. See the first line of page 2 of General Counsel's Exhibit 5 which, as here pertinent, are allegedly some handwritten notes of Burton taken during the March 8, 1993 meeting.

Regarding March 8, 1993, Nickell testified that he met Burton for lunch and they went over Respondent's proposal, General Counsel's Exhibit 4; that he then met with the members of employees' committee to be brought up to date; that they then met with the Company's representatives; that he asked if the Company had been losing money and Columbus said the Company lost money 9 of the last 10 years; that he then asked to see the Company's books and Dunlevy said absolutely not; that toward the end of the meeting Columbus said that in the past year the Company lost $1 million and he, Nickell, again asked to see Respondent's books; that when he asked for the number of items the Company ran through the plant in the last 3 years and what the projected number would be for the next 2 years Columbus said that (a) the Company would be running 20 percent less; (b) he did not know if he could readily get that information and (c) the volume of business had been between $11 and $12 million; that as an alternative to the proposed testing the Union proposed taking a look at the existing labor agreement since ''the seniority had all kinds of flexibility built into'' it; that Dunlevy said the Company was not going to negotiate away from its plan; that when the Union asked how does this affect the existing labor agreement company representatives would say ''don't try to negotiate away from our plan''; that he verbally asked the questions on the first sheet of General Counsel's Exhibit 5; that he did not believe that he asked question number 8, namely who was going to do the maintenance;[6] that it was indicated that the Company wanted to put the plan into effect by June 1, 1993, and when he asked if there was going to be any training he was told no because the Company was losing a $1 million that year; that at that point he, Nickell, said if you are losing money we would have the right to see the books because you are ''making a major change in the agreement that's going to affect wages, it's going to effect everything''; that he explained to the company representatives that he needed the financial information to discuss it with the employees because they were having some difficulty believing the Company was losing money when the Company had negotiated an agreement giving wage increases; that Dunlevy, who came down from Pennsylvania, indicated that he wanted to meet again on March 9, 1993, but he, Nickell, indicated that he wanted to present the information to the membership first; that Dunlevy indicated he had a 2- or 3-day commitment the following week and ''we indicated that we had a staff meeting that was going to be held in Louisville . . . at the Galt House . . .

[5] Specifically, question (1) asked what will be the hourly rate for a flexible machinist, question (2) spoke to severance pay to those employees who would be laid off, question (3) dealt with pensions, question (4) asked for the number of items the Company had run through the plant in the last 3 years and what was the projected number for the next 2 years, question (5) asked who does the tool sharpening, question (6) asked for the proper name and address of P.S.P., question (7) asked who put this program together, and question (8) asked about who would do the maintenance.

[6] It is noted that p. 1 of G.C. Exh. 5 contains ''completed by team.'' after ''8. maintenance.''

between the 18th . . . [and] the 20th''; that Burton said that they could meet on the 15th, 16th, and maybe a half day on the 17th, and, if necessary, they could skip the Louisville trip; that they left the March 8 meeting with the understanding that Prah could contact Burton if there was a change in plans and the Union would try to accommodate the Company; and that he, Nickell, thought ''it was . . . [concluded] along the lines that . . . [Burton] could get with . . . Columbus.'' On cross-examination Nickell testified that at the March 8 meeting he brought up the subject of money when he asked if the Company was losing money and Columbus said that it had lost money 9 out of the last 10 years; that when he, Nickell, asked to see the Company's books, the company representatives indicated that they would not show the books because the Company was not seeking a wage concession; that under the employee stock ownership program (ESOP) moneys that were put aside by the Company for the ESOP would revert to the Company if, as was done, the Company relocated within 5 years of an unspecified date; that under the collective-bargaining agreement that Elliott had with the Union there was a provision dealing with reductions in force and if the Company wanted to lay off say 30 people it could lay off 30 people; that on the second page of General Counsel's Exhibit 5 the following appears:

> Company is coming in here deliberately trying to force the Union to turn them down. Now, we . . . W & F next wk. in Ky. Velmer be in touch call your group, can fax you materials needed;

and that while the company representatives indicated that they wanted to meet the next day and they thought they could provide some of the information, the Union wanted the information to meet with the membership before there was another meeting with the company representatives. On redirect Nickell testified that the Union had a self-directed work force in areas at the General Electric Company that occurred after the plan was partially negotiated with the Union; and that that plan took 2-1/2 to 3 years to put it into effect.

With respect to the March 8, 1993 meeting, Columbus testified that Nickell asked if the Company was losing money and when Columbus said that it had lost money for 9 out of the last 10 years Nickell asked if he would be able to see the Company's financial records; that Dunlevy said that the Company was not asking for wage or fringe concessions and, therefore, the financial records would not be made available; that he did not know how to gather the information Nickell asked for regarding product flow, especially as it related to the future; and that when Dunlevy asked if they could meet the next day, with the Company providing the information, the union representatives said they wanted to meet with the membership to determine if the membership wanted the Union to discuss the plan; and that the Company made notes of this meeting. (R. Exh. 3.)[7] On cross-examination Columbus testified that Respondent does keep computer records of what it makes as well as what it sells but the problem was that it was in the process of reducing its part numbers from 36,000 to 8000 and certain of the part number information was being deleted; that Respondent did have a forecasting formula to compare what sales were before the relocation and what they were expected to be after the relocation; that while Nickell asked to see the financial records at the beginning of the meeting Columbus did not recall Nickell asking for these records at the end of the meeting; and that he did not recall telling the Union that Respondent was going to be losing $1 million that year and such statement is not in the Company's minutes of the meeting but if ''that question was asked that would have been the answer.''

With respect to the March 8, 1993 meeting, Dunlevy testified that he told Nickell once during the meeting that the Company would not show the books because while it was looking at making changes in the contract, it was not looking at making changes in the wages or fringes and it did not deem the bargaining concessionary; and that he did not recall the request for financial information coming up again at this meeting.

After the above-described meeting on March 8, 1993, Burton personally received a letter from Respondent's general manager, Joseph Smith, which letter is dated March 5, 1993, and which letter indicates that Respondent intended to discontinue operations at its Dayton facility as of the end of the day of May 7, 1993. (G.C. Exh. 7.) The letter indicates that the notice was sent in accordance with Section 3(a)(1) of the Workers Adjustment and Retraining Notification Act.

On March 11, 1993, Burton received a fax from the Respondent, General Counsel's Exhibit 6, in which it gave responses to seven of the questions asked by the Union during the March 8, 1993 meeting.[8] The fax[9] reads as follows:

> 1. Hourly rate of new classification?
>
> RESPONSE:
>
> If the Company's Plan is accepted by the Union, the rate for this classification would be based on similar rates paid for like jobs in the area. The rate for this classification could be established at a level higher than any rate in the current contract.
>
> 2. Severance package for employees?
>
> RESPONSE:
>
> To be negotiated as part of acceptance of the Company's Plan or as part of a plant closing. At a minimum, severance will be paid in accordance with the current contract language.
>
> 3. Will the company consider early, unreduced pension for employees 55 years of age and older?
>
> RESPONSE:
>
> If the Union were to accept the Company's Plan, the Company would be willing to consider this request as part of any acceptance package. Otherwise, the pension plan provides for pension funds distributions in the event of a plant closing and plan termination.
>
> 4. Provide a list of products that ran through the shop the last three years and provide a projection for the next three years.
>
> RESPONSE:

[7] The notes introduced herein were typed. The handwritten notes taken at the meeting which were made available at the hearing herein, were, according to counsel for the General Counsel, brief, while the typed notes, excluding the cover page, are 14 pages long. P. 13 of the exhibit lists seven questions. It does not list a question as to who would do the maintenance.

[8] As noted above, according to Burton's notes, G.C. Exh. 5, it was indicated during the March 8, 1993 meeting that maintenance, which was the eighth question, would be completed by the team.

[9] Nickell also received this fax.

We do not know how to capture this information. Therefore, it cannot be provided.

5. Who will sharpen tools?

RESPONSE:

Each cell will be responsible for the sharpening of their own tools. This may be done internally or through outsourcing.

6. What does PSP stand for and what is their address? Is it associated with a college or university? Is it privately owned?

RESPONSE:

Psychological Services of Pittsburgh

Union Trust Building Suite 430

Pittsburgh, PA 15219

PSP is not associated with any college or university. PSP is privately owned.

7. Who is the consultant who put this program together?

RESPONSE:

This program has been created in it's entirety by the Elliott Company. No independent consultants were used.

On March 13, 1993, the Union had a meeting with the membership to explain to them what was occurring and to answer their questions. Burton testified that the membership requested that the representatives go back to the Company and try to negotiate the best possible agreement they could get. Nickell, who also attended the March 13 membership meeting, testified that the only information the Company provided before the March 13, 1993 meeting was that contained in General Counsel's Exhibit 6, the March 11, 1993 fax he and Burton received from the Company; and that the membership told them to go back and try to negotiate to try to save the jobs in Dayton.

According to Burton's testimony, he thought that when he telephoned Columbus on March 14, 1993, he, Burton, requested a meeting on March 15 and 16, 1993. Initially Burton testified that he telephoned Columbus about 7:15 or 7:30 p.m. and that they spoke for minutes. Burton testified that when he and Columbus talked about setting up a meeting for the coming week Columbus indicated that since Dunlevy had about 41 inches of snow in his area in Pennsylvania, he would not be able to make the meeting during the first part of the week and he had commitments the second part of the week; that he told Columbus that Burton would be in Louisville at the Galt House and Columbus could contact him there; that Columbus asked him what the membership thought of the proposal and he told Columbus that ''giving up seniority and stuff like that would be a very hard thing, but when we came back to negotiate, anything was possible''; and that when he said that the Company blindsided the Union from day one and it was a take-it or leave-it type deal, Columbus said that what he said was off the record and ''it was easier for the company to come in and give a plan that they knew the membership couldn't accept than just tell them that [the Company was] going to be moving. On cross-examination, Burton testified that Columbus asked him to call after the membership meeting; that Columbus telephoned Burton's father by mistake on March 14, 1993, and his father told him about Columbus' call; that he then telephoned Columbus; that he told Columbus that Burton did not know whether the membership would accept the empowered concept or the loss of their seniority but they would sit down at the bargaining table and ''who knows where we'll go from there''; that he was sure that he did not say that they would never agree to the team, self-governing concept and they would let the doors close first; that he thought he asked Columbus to try to set a meeting up for March 15 or 16, 1993, but Columbus said that Dunlevy had 41 inches of snow in his area and he would not be available at the beginning of the week and he would not be available at the end of the week because he had other commitments; that he told Columbus either Burton would call him from Louisville and leave a number where Columbus could contact him or if Dunlevy could schedule something, Columbus should call Burton in Louisville and he and Nickell could break away from Louisville and come back to Dayton; that there was no anticipation of a meeting either way during that coming week because of the snow and Dunlevy's prior commitments; and that Columbus said that he had ''to do what's on the table . . . [i]t's out of my control.'' On redirect, Burton testified that during this telephone conversation Columbus said, ''Velmer, I've got be honest with you. I've got to do what's on the table. It can't go back to the old contract language. This is out of my hands; it's out of control.''

Regarding his telephone conversation with Burton on March 14, 1993, Columbus testified that, when he attempted to telephone Burton, telephone information gave him the telephone number for Burton's father; that later that evening Burton telephoned; that Burton said that (1) the Union could not live with eliminating seniority, (2) the Union would not consider self-governing work teams, and (3) the Union would say no to self-disciplining work teams until the doors close; that they discussed Dunlevy's ability to come to Dayton from Pennsylvania in view of a big snowstorm; that

> Velmer told me of his plans to go out of town to Louisville and said that—we left it that he would call on Tuesday morning and give me the number where he could be reached so we could decide what to do from there;

that he made two pages of notes (R. Exh. 4) of this telephone conversation that lasted from 10:15 p.m. until 10:50 p.m.; that they decided that Monday, March 15, 1993, would not be a likely meeting date because of Dunlevy's situation; and that they would know better Tuesday morning, March 16, 1993, about Dunlevy's situation and Burton, who was going out of town, said he was going to call Tuesday morning. On cross-examination Columbus testified that during his conversation with Burton on March 14, 1993, Burton said that he would be available to meet with Respondent's representatives Monday, March 15, 1993, but he ''would be in Louisville on Tuesday morning and would call me, upon arriving, with his number''; that Burton asked him if Columbus had heard of the Galt House in Louisville, Burton did give him the name of the hotel Burton was staying at in Louisville but Columbus did not recognize the name and Burton said he would ''contact . . . [Columbus] with the number on Tuesday morning''; that he did not discuss Dunlevy's schedule for the end of that week with Burton during the call on March 14, 1993; that he telephoned Dunlevy on March 14, 1993, after speaking with Burton and he, Columbus, told

Dunlevy that Burton was going to call on Tuesday morning. Columbus' notes of this conversation end with following:[10]

> V Ending—I think we can work out a plan using existing contract.
>
> B I'm being honest Velmer, this plan is our future. I understand you are willing to negotiate to a middle ground. Our position is we won't bargain away from the plan . The question is ''Can you accept work under the concept as presented?''
>
> V He'll call me this week. Tuesday.

On Monday, March 15, 1993, according to his testimony, Columbus telephoned Dunlevy in Pennsylvania and Dunlevy was available for the entire week. Burton testified that ''it seems like on the 15th . . . [he] called the company.'' According to Burton's testimony, he ended up talking to Prah. Burton did not know why he did not speak to Columbus on March 15, 1993. Burton's calendar did not have any entry for March 15, 1993.

Burton's calendar indicates that on March 16, 1993, he had a doctor's appointment at 9:45 a.m. and a business meeting at a Company named McCauleys at 1 p.m..

Columbus testified that Burton did not telephone on Tuesday, March 16, 1993.

On March 17, 18, and 19, 1993, Burton and Nickell were in Louisville.

According to the testimony of Columbus, Respondent decided on March 17 or 18, 1993, to close the Dayton Manufacturing operation. Columbus testified that while Respondent stressed to the Union that time was of the essence, there was not, in Respondent's opinion; any interest on the part of the Union to talk about the Company's plan.[11] On cross-examination Columbus testified that on March 17 and 18, 1993, he had three meetings with Joe Smith and with Dunlevy on the telephone and the decision was finalized by these individuals on Thursday, March 18,1993.

On Monday, March 22, 1993, Burton's first working day back from Louisville Burton telephoned Columbus who then had a letter faxed to Burton. Respondent's March 22, 1993 letter from Smith to Burton, General Counsel's Exhibit 9, indicates that Respondent made a final decision to discontinue manufacturing operations in Dayton effective May 7, 1993. The letter goes on to state as follows:

> Each eligible employee will be provided with a severance allowance according to Article 20 of the Labor Agreement at the time of employment termination. If you wish to discuss any other matters with regard to the cessation of operations, please contact me.

According to Burton's testimony, he and Columbus discussed the fact that the Union did not get the opportunity to actually negotiate anything because it was always a take-it or leave-it type of deal. Burton testified that Columbus said that the final decision to close the operation was made on March 19, 1993. On cross-examination Burton testified that he telephoned Columbus after Prah told Burton that Columbus was trying to contact him.

With respect to his telephone conversation with Burton on March 22, 1993, Columbus testified that he tried to reach Burton, and Prah was finally able to contact Burton and have him telephone the Company; that he told Burton that Burton did not call on the ''15th'' and as a result of their conversation of March 14, 1993, and the fact that ''we weren't able to see an interest in getting together, the decision has been finalized to close''; that they discussed why Burton did not telephone; and that when Burton asked when the decision was made Columbus told him that it was made late the previous week.

According to his testimony, on either March 22 or 23, 1993, Nickell telephoned Dunlevy to arrange a meeting. With respect to the telephone call, Nickell testified that he told Dunlevy that (1) the Union had experiences with self-directed work forces and job combinations, and the Union was willing to sit down and try to work something out that both parties could live with, and (2) the Union wanted to save whatever jobs it could in Dayton; that he believed that they agreed to meet on March 29, 1993; and that when he asked Dunlevy if the Company was going to move the operation Dunlevy said that at that time he did not know and the operation could be in Ohio, Tennessee, or Pennsylvania. Dunlevy testified that Nickell telephoned him on March 24, 1993, to discuss when they could get together for a side bar and effects bargaining; and that there were no telephone conversations between him and Nickell from March 8 to 24, 1993. On cross-examination Dunlevy testified that Nickell thought they were supposed to meet on March 29, 1993.

Sometime between March 22 or 23 and 29, 1993, Nickell contacted Dunlevy to find out where the March 29, 1993 meeting was going to be held. Nickell testified that Dunlevy said that it was not his understanding that there was going to be a meeting on March 29, 1993; and that he told Dunlevy that the Union was making an effort to determine ''where you all are coming from.''

By letter dated March 29, 1993, General Counsel's Exhibit 14, Dunlevy advised Nickell as follows:

> This is to confirm the telephone message I left with your Secretary, Mabel, last week.
>
> We will meet with the Union Committee to commence effects bargaining on Wednesday, April 14,1993, time and place to be decided. Due to scheduled commitments we are unable to meet before this time.
>
> Should the 14th be unacceptable, please contact me or Bob Columbus.

Nickell testified that it was finally agreed that there would be a side bar meeting on April 13 and a meeting of the committees on April 14, 1993.

By letter dated March 31, 1993, General Counsel's Exhibit 10, the Union advised Respondent as follows:

> This letter is in response to the Company's unilateral action of trying to change the current existing labor agreement between the l.A.M.A.W., Local Lodge No. 225 and the Elliott Company which is in effect until June 24, 1995. It must be noted the Company's General Manager, Joseph Smith, requested a meeting with the Union on March 4, 1993, on site, at the Company's plant location at 2 p.m. on that date. However, upon my arrival at the plant, the Union was informed to go

[10] ''V'' is Burton and ''B'' is Columbus.

[11] Columbus pointed out that Respondent's fiscal year runs from June through May and it wanted the plan in operation by June 1, 1993, so that it could make the new fiscal year a turn around year.

to the Hampton Inn, across from Wright University, yourself, Bob Columbus and Al Chenaweth met with the Union. The agenda for their meeting was not given prior to this meeting to any member of the shop committee, nor my office. The Company presented a overhead projector presentation of its ''Discussion Sheets on Resizing of Product Lines and Company's Profitability Assurance Plan.''

During the aforementioned meeting the Company stated the following:

(1) No longer can accept losing money. (No profit nine out of the past ten years.)

(2) Reduction of current nineteen labor classification to one classifications called flexible machinist.

(3) Union must accept Company plan or else a plant closing will occur.

(4) ''Don't try to bargain away from this plan.''

The Union position with regard to the above issues and during subsequent meeting on March 8, 1993, the Company has never at anytime given any specific contract language to change, nor has the Company been willing to accept or listen to any suggestions from the Union with regard to the labor agreement. The union stated during the March 4th and 8th meetings that it would meet at anytime with the Company to discuss changes in the contract in an attempt to suit the company situation. However the Company chooses to not meet to discuss the effect its plan would have on the current labor agreement.

Also, during the March 8th meeting, the Union requested additional information and the Company failed to provide all the information requested by the Union.

In order for the Union to properly assess the situation and represent the bargaining unit members fairly, the Union requests the following information. Due to the fact the Company claims to have lost money nine of the past ten fiscal years, the Union orally requested that the Company show its financial records to show it not being profitable.

In addition to the financial reports the Union is now asking for the information the Company failed to provide in its ''Union Question Meeting of 3–8–93'' response sheet, (item #4).

The Union is and has always been willing to meet the Company representatives at anytime to discuss any change the Company may wish to negotiate in the labor agreement. Then, March 22, 1993, you faxed my office a letter from Joseph W. Smith that the Company position was that they had made a final decision to discontinue manufacturing operation at the Dayton plant effective Friday, May 7, 1993.

We now have meetings scheduled for April 13 and April 14, 1993 due to the Company's change of position.

Burton and Nickell testified that the Union never received any information from Respondent regarding its financial records or the number of items Respondent ran through the plant in the last 3 years and the projected number for the next 2 years.

By letter dated April 7, 1993 (G.C. Exh. 11), Respondent through Dunlevy advised Burton, with a carbon copy to Nickell, as follows:

I am in reply to your letter of March 31, 1993 concerning our discussions in early March, 1993 as to the future of Elliott's manufacturing operations in Dayton. Because your letter misstates certain facts and events, and incorrectly draws certain conclusions, I feel compelled to re-visit some of the events over the past month.

First, the Company acknowledges that a Labor Agreement exists between the Company and your Union, and that this Labor Agreement does not expire until June, 1995. However, this Labor Agreement specifically vests the Company with the unilateral right to permanently discontinue manufacturing operations in Dayton and to relocate those operations elsewhere if the Company elects to do so. In that event, the Labor Agreement also provides agreed upon severance pay benefits to eligible bargaining unit employees.

Despite the above provisions of the Labor Agreement, the Company, in good faith, met with Local Lodge No. 225 in an attempt to determine whether your Union was receptive to operational changes that the Company felt were necessary to keep manufacturing operations in Dayton. From the outset of the Company's presentation and discussions on this subject, however, the proposed plan met with strong resistance from you, John Nickell and the committee. Not once did we hear that the Union was willing to even consider the concept of our plan which, as your recognized, would have required changes to the Labor Agreement. Quite the contrary, we heard loud and clear that the Union was not willing to open the contract ''to bargain away seniority.''

In your March 31 letter, you wrote that ''the Union stated during the March 4th and 8th meetings that it would meet at anytime with the Company to discuss changes in the contract in an attempt to suit the Company situation.'' Our recollection and notes (and, your actions) show the opposite. In the wrap up of the second meeting on March 8, you said, ''we're not interested in a meeting for the rest of this week until we meet with the union personnel over the weekend. Maybe the union people don't want us to negotiate a new plan. We must ask the membership if they will accept this new plan, but I don't think they will accept any part of this plan. I wouldn't accept this and right now would have you stick it up where the sun doesn't shine.'' These remarks certainly did not indicate that you were willing to meet at anytime. In fact, I encouraged further meetings that week, and you refused.

After the membership meeting on Saturday, Bob Columbus called John Prah and you on Sunday to see if we could continue discussions. You suggested to Bob that we meet in a side-bar to discuss variations to our plan, but stated that you could not bargain away seniority, nor accept the concept of discipline by union members. You said, ''The doors will close before allow union members to discipline other union members.'' Then, you told Bob you would be in Kentucky until

> Thursday, March 18, 1993, but you would call Bob on Tuesday. No phone call was received and no other word came from the Union the remainder of that week about any meeting to discuss our proposal. It was not until late Monday, March 22, 1993, that you called Bob Columbus at the plant after John Prah requested you do so. Bob informed you that the Company had finalized its decision to discontinue manufacturing operations in Dayton effective May 7, 1993. And even then, you gave no indication of any desire by the Union to meet concerning our plan. As a result, the final decision letter was mailed to the Union on Tuesday, March 23, 1993, after more than two weeks had elapsed since the March 8th meeting. You were faxed a copy of the letter.
>
> The Company was willing and able to meet and bargain the necessary changes, and particularly in light of the gravity of the situation, we encouraged meetings. You were unable or unwilling to meet between March 8th and March 22nd, when the decision was finalized.
>
> In reference to the additional information that you claim the Company failed to provide, again, I reiterate the following. First, the Company has not, and did not, request concessions in wages and/or fringe benefits as part of our operational change proposal. Therefore, there is no relevant need to provide any financial data to you. Second, the Company had no obligation to discuss this matter with you even though it chose to do so.
>
> On the matter of Item #4 on our written answers to questions of March 8th, we told you that we do not know how to capture the information on products that ran through the shop the last three years, nor are we able to provide a projection for the next three years. Also, the information is redundant and not relevant to the decision to close the Dayton facility.
>
> In conclusion, you have confirmed our meeting date of April 13, 1993, in reply to your request for a ''side bar.'' This meeting will be held at the Hampton Inn in Centerville, commencing at 2:00 p.m. Then, on April 14, 1993, the parties will meet to discuss the effects of plant closing on bargaining unit personnel.
>
> In the meantime, if you have any questions, please call me.

Regarding this letter, Burton testified that while seniority was an issue, he did not think that the Union ''ever out and out refused to bargain away seniority''; that the Union's position at the March 8, 1993 meeting was that seniority should be the deciding factor; that on March 8, 1993, Dunlevy asked employees Horning, Prah, and Paul Chaney what they though about the plan and none of them responded; that Dunlevy then asked him what he thought about the plan and he said ''if I was a long-term employee of this company and you were taking my seniority away, I would tell you to stick it where the sun doesn't shine'' and he then said that as a business representative it was his responsibility to represent the members to the best of his ability;[12] that during his telephone conversation with Columbus on March 14, 1993, Burton said that seniority would probably be a problem and he believed that he told Columbus that either he would call him on Wednesday or Columbus could call him in Louisville; and that in the March 8, 1993 meeting Nickell told the Company representatives that he and Burton if need be, could break away from the Louisville commitment and come back up to Dayton but Dunlevy had other commitments at that time.

On April 13, 1993, at the behest of Nickell the Company and the Union had a side bar meeting with Burton, Nickell, Dunlevy, and Columbus present. Regarding the side bar meeting he and Dunlevy had with Nickell and Burton on April 13, 1993, Columbus testified that the meeting was held to discuss effects of the decision to close the plant; that mostly they talked about what the Company was going to be able to or willing to pay in terms of severance and employee costs related to the closing; and that he did not recall if Nickell and Burton asked to bargain about the concept during this meeting. Dunlevy testified, with respect to this meeting that Nickell asked where is the plant moving and they discussed the fact that a lease had been signed in Columbus; and that they then discussed issues relating to effects bargaining such as severance, insurance, pensions, vacations, and ESOP.

On April 14, 1993, the full committees of the Company and the Union met. With respect to the meeting, Nickell testified that the Union indicated that it was willing to go along with measures, within reason, to make the operation more efficient so that the Company could stay in business in Dayton but that Dunlevy said, ''[W]e done made the decision to shut down. We've not even here to talk about that.''

The Company and the Union met four times in April 1993 and three times in May 1993. At an April 27, 1993 meeting the Union introduced a proposal on the company profit assurance plan.[13] (G.C. Exh. 12.) Burton testified that company representatives, on April 27, 1993, indicated that the Company did not want to negotiate anything away from their plan, ''[e]ither take the plan or, that was always their position.'' The Union's proposal was repeated at the May 6, 1993 meeting. (G.C. Exh. 13.)[14] Burton testified that the Union unsuccessfully attempted to discuss the decision to close at the April and May 1993 meetings. He also testified that the Union

> never, ever had the opportunity to sit down and respond to the company, to sit down and talk how their changes would affect the labor agreement. We never really had that opportunity. . . . [b]ecause every time we asked for it. . . . [the company representatives] said . . . [the Union] had to work within the framework of the concept. . . . [the Company] was not going back to the old traditional method. It's going to be this way or else.
>
> . . . .
>
> They told us either accept the concept or else they would be closing the doors.

[12] Nickell corroborated Burton's testimony.

[13] The proposal, which begins with ''[t]he Union desire is to have an opportunity to respond to company discussion of the Company Profit Assurance Plan, in an attempt to save jobs,'' covered union recognition, pension, severance pay, medical insurance, life insurance savings plan and ''ARTICLE 17 INSURANCE.''

[14] This proposal spoke to the same topics covered in the above-described April 27, 1993 proposal.

Regarding the April 27, 1993 meeting, Nickell testified that when the Union gave the Company the union proposal and attempted to talk about the Company's profit assurance program so as to save the jobs in Dayton, the company representatives said that ''that's over with; that they don't want to discuss that; that ain't even why they're at the meeting.'' On cross-examination Nickell testified that the Union's April 27, 1993 proposal was the first time that the Union gave the Company a written proposal regarding the Company's profit assurance plan.

On May 7, 1993, Respondent closed its manufacturing operation at the Dayton facility. Production had ceased the day before. Columbus testified that it was his belief that under the collective-bargaining agreement in effect at the time, General Counsel's Exhibit 3, the Company had the right to shut down the Dayton plant and relocate it. More specifically, Columbus cited language in (1) ARTICLE 3—management's rights, namely, ''[t]o decide location of its plant, and to relocate the same; to permanently discontinue the conduct of its business and operations'';[15] (2) ARTICLE 20—severance pay which, as here pertinent, reads as follows: ''*Section 1*. When in the sole judgment of the Company, it decides to close permanently a plant'' and (3) section 1 of article 16—General provisions that reads as follows:

> *Section 1*. The Company and the Union, for the life of this Agreement, have voluntarily and unequivocally agreed that the other shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement.

Additionally, Columbus testified that in 1984 the Company proposed to delete the last sentence of the management-rights clause, namely, ''Before final decision to discontinue the conduct to its business and operations, the Union will be advised and discussions held,'' see Respondent's Exhibit 8, and that sentence was deleted from the management-rights clause in 1984; that in 1984 the Company proposed to add to the severance pay language ''When in the sole judgment of the Company, it decides to close permanently a plant.'' See Respondent's Exhibit 8, and said language was adopted in the 1984 agreement; that in 1984 the Union proposed changing the severance-pay clause language and the management-rights clause, Respondent's Exhibit 9, and none of these union proposals were adopted; and that, as here pertinent, in 1987 the Union proposed, see Respondent's Exhibit 10, changing the severance pay clause and restricting the Company's rights to shut down the plant and relocate it and neither of these proposals were accepted by the Company.

On rebuttal, James Ronto, who is a retired business representative of the Union and who was the chief negotiator for the Union in contract negotiations with Respondent on the 1981, 1984, and 1987 agreements, testified that the last sentence of the management's-rights article in the 1981 agreement, Respondent's Exhibit 5, reads ''Before final decision to discontinue the conduct of its business and operations, the Union will be advised and discussion held''; that in 1984 the Company proposed deleting this sentence, Respondent's Exhibit 8, and it was not included in the 1984 agreement; that the Company indicated during the 1984 negotiations that this language was more or less redundant because other language in the agreement, article VII, section 2, ''stated that the company would meet with . . . [the Union] and discuss, upon the union's request . . . grievances, union company activities and controversies [and] disputes''; that the words ''and/or relocated'' which were in the 1981 agreement in the recognition article were, at the behest of Respondent, not included in the 1989 agreement; that Respondent indicated during the 1984 negotiations that any relocation would be from its Springfield, Ohio plant to Dayton since the Springfield plant was fairly old and had no room to expand; that notwithstanding the Company's assurances during the 1984 negotiations, the Union unsuccessfully attempted to have the management-rights article modified to include language which, away other things, (a) required the Company to give 2 year's notice of a decision to relocate from the Dayton location (b) required the Company to negotiate with the Union as to the effects such changes would have on unit employees, and (c) prohibited the Company from relocating work to any other plant; that in 1984 article XXI severance pay was modified to include, among other things, language reading ''When in the sole judgment of the Company, it decides to close permanently a plant,'' but that the Union did not believe this was a concession since it just set upon the condition on which employees receive their severance pay and it did not give the Company the right to close without negotiating, and the Company indicated that it was attempting to be consistent with the terminology in some of its other contracts that it had at some of its other plants; that, as here pertinent, during negotiations Respondent sent a letter on June 15, 1984, to its involved employees, General Counsel's Exhibit 19, in which it indicated that the revised recognition and severance language was consistent with other Elliott facilities;[16] and that during the negotiations for the 1987 agreement closing and relocation was discussed but such discussion focused on the Springfield plant and there was no discussion of closing Dayton at that time. On cross-examination Ronto testified that when the Company proposed deleting ''[b]efore final decision to discontinue the conduct of its business and operations, the Union will be advised and discussions held'' from the management's rights article in 1984 it explained that this ''was covered . . . in another section in respect to meeting with . . . [the Union] namely Article VII Section 2''; and

[15] In its entirety, the article reads as follows:

ARTICLE 3—MANAGEMENT'S RIGHTS

Subject to the provisions of this Agreement, the Union hereby recognizes that the management of the plant and direction of the working forces, including the right to direct, plan, control plant operations, establish and change working schedules, the right to hire, transfer, suspend or discharge employees for cause, layoff employees because of lack of work or for other legitimate reasons, the right to introduce new or improved methods or facilities or to mange the properties, is exclusively vested in the Company. To decide location of its plant, and to relocate the same; to permanently discontinue the conduct of its business and operations.

[16] The involved page of the letter begins with the following:

ELLIOTT PROPOSAL ON CONTRACT LANGUAGE

Because of the depressed economic conditions in our industry, Elliott has told the Union that economic improvements in the contract must be coupled with revisions in contract language that permit the flexibility the Company needs to improve its competitive ability to book business in shrinking markets and thus to protect our employees' jobs.

that during the negotiations for the 1987 agreement he and the company representative initialed approval of a management-rights article which contains a ''; '' before ''To decide location of its plant.'' (R. Exh. 13.) On redirect, Ronto testified that the aforementioned semicolon may have been a ''typo''; that he assumed it was a period and not a semicolon; and that both the master agreement and the printed booklet of the agreement have a period and not a semicolon at this point in the paragraph.

The following emphasized language appears for the first time the collective-bargaining agreements between the Company and the Union in the 1965 agreement, General Counsel's Exhibit 2:

ARTICLE III—MANAGEMENT'S RIGHTS

> The Union hereby recognizes that the management of the plant and direction of the working forces, including the right to direct, plan, control plant operations, establish and change working schedules, the right to hire, transfer, suspend or discharge employees for cause, layoff employees because of lack of work or for other legitimate reasons, the right to introduce new or improved methods or facilities or to manage the properties, is exclusively vested in the Company, subject to the provisions of this Agreement. *To decide location of its plant; and to relocate the same: to permanently discontinue the conduct to its business and operations. Before final decision to discontinue the conduct of its business and operations, the Union will be advised and discussions held.* [Emphasis added.]

The fate of the last sentence quoted above is noted above.[17] No evidence was introduced herein regarding negotiations over the 1965 agreement, with respect to the language underlined above.

With respect to Respondent's Dayton facility, Columbus testified that Respondent owns 17 acres of property and it had one 36,000-square-foot structure, which was built in 1966, on the property; that Respondent still owns the property; that Respondent's sales and marketing function, and finance, purchasing and engineering functions, all of which are used in support of its Columbus operation, are still conducted at its Dayton facility; and that about 5500 square feet of the 21,500-square-foot production area formerly used by Respondent at the Dayton facility is leased to Production Screw Machine Company on a month-to-month basis.

The Union did not file a grievance protesting the Company's decision to close the plant and relocate to Columbus.

In early July 1993, after Respondent moved its manufacturing operation to Columbus, Burton, and Nickell visited the facility. With respect to the visit, Burton testified that Columbus said that Respondent was using the same equipment it used in Dayton, except that it had one new piece of equipment, and it was making the same parts;[18] and that he recognized about six of the people there.

Regarding the Columbus operation, Columbus, who, as noted above, is the operations manager at Columbus, testified when called by counsel for the General Counsel that while his primary function is in Columbus and that is where he spends his time, he still has an office in Dayton; that Respondent leased for a term of 5 years, a facility in Columbus as evidenced by General Counsel's Exhibit 17; that the Columbus facility has about 7000 square feet less production area than Respondent has in Dayton; that Respondent moved into the Columbus facility about May 1, 1993; that the lease agreement for the newly constructed Columbus facility was entered into on March 22, 1993; that discussion about the Columbus facility commenced in early February 1993; that Respondent looked at facilities in Kentucky and North Carolina in early February 1993; that Respondent looked at two locations in Tennessee in late October 1992; that the tools Respondent makes in Columbus are the same tools it made in Dayton, except that it no longer makes tools that are functionally duplicated by another tool it makes; that the advertising brochures Respondent uses are the same ones that were used to promote the Dayton products; that Respondent does not have a sales function in Columbus but rather it utilizes the same arrangement that sold the tools made at its Dayton facility; that Respondent's customers and suppliers are basically the same for Dayton and for Columbus; that about 85 percent of the machines utilized in Dayton were moved to the Columbus facility; that one new machine, an EDM machine that is the same as what Respondent had at Dayton, was purchased at the Columbus facility; that of the 16 individuals employed at Respondent's Columbus facility including Columbus, all but 1[19] formerly worked at Respondent's Dayton facility; that production began at the Columbus facility on May 10, 1993; that those hired at Columbus were tested by P.S.P. in April and May 1993 for job skills and job behavior; that additionally Respondent has used between 3 and 8 part-time employees at Columbus; that initially it did not put the part-time workers through the testing procedure but at the time of the hearing herein it did; that Respondent did not expend any money to train the individuals who worked at Columbus; that each of the three cells in Columbus has a facilitator who talks to Mr. Columbus about the production of the cell, if there is a machine problem or if they have an extraordinary purchase; that the three facilitators are Chenoweth, Ed Damron, and Bruce Kouse, all of whom held supervisory positions at Dayton; that the facilitator conducts team meetings; that he made the final decision on who to hire for Columbus considering the recommendation of the team; and that at the time of the hearing herein the facilitators were empowered to make the final decision on who to hire and they would extend the offer of employment. Columbus testified that Respondent has been able

[17] Ronto testified that during the 1987 negotiations with the Company the Union convinced the Company to move ''subject to the provisions of this Agreement'' to the beginning of the paragraph ''to make sure it applied to those portions up above without affecting the sentence'' beginning with ''To decide location . . . .''

[18] According to Nickell's testimony, Columbus said that the Company was making the same products it did in Dayton, except that it had discontinued some ''low volume products.''

[19] J. L. Silba, see G.C. Exh. 18. Two others, J. J. Thompson and R. E. McKinley, who had left Respondent's Dayton facility 1-1/2 to 2 years before 1993, were in the involved unit at that facility. These individuals were contacted by Respondent's management to determine if they were interested in working at Columbus. One half of the 16 formerly held management positions at the Dayton facility.

to maintain at Columbus the same level of shipment or, in other words, orders shipped within 5 days as it did at Dayton; that it has been able to accomplish this with roughly 50 percent of the hours that the machinists required to produce the product at Dayton;[20] that labor costs were not a factor in bringing this plan into existence and on the average Respondent is paying about $2.50 more an hour in Columbus than it did in Dayton; that Respondent also has a gain sharing program in Columbus; and that there are several improvements in the benefits at Columbus involving life insurance and pension. On cross-examination Columbus testified that the employees at Columbus have a slightly better vacation plan than they had in Dayton, the same ESOP is maintained in Columbus, the same holidays are observed, they are paid for overtime by the same method they were paid in Dayton, they have basically the same funeral leave policy and life insurance benefits are higher.

Michael Breh, who is controller of Respondent's tool division, sponsored an exhibit, Respondent's Exhibit 12, which assertedly shows the cost impact of moving the operation back from Columbus to Dayton. The exhibit is attached hereto as Appendix C. With respect to certain of the entries, Breh could not explain why the air compressor hook up at Dayton would be greater than it was at Columbus, he included the loss of rental income at Dayton that may not be as high as estimated in light of the fact that the involved lease is a month-to-month lease, he included the cost of purchasing three machines, which is necessitated by the sale of the three machines at Dayton, without reducing the estimated amount by the amount which Respondent received for the sale of the three machines, and he included what are described as additional rework and scrap costs at Dayton, albeit he was unable to explain why they were less at Columbus.

Analysis

First it must be determined whether Respondent's decision to relocate was a mandatory subject of bargaining.

In *Dubuque Packing Co.*, 303 NLRB 386, 391–392 (1991) the Board set forth the following standard for determining whether a decision to relocate bargaining unit work is a mandatory subject of bargaining:

> Initially, the burden is on the General Counsel to establish that the employer's decision involved a relocation of unit work unaccompanied by a basic change in the nature of the employer's operation. If the General Counsel successfully carries his burden in this regard, he will have established prima facie that the employer's relocation decision is a mandatory subject of bargaining. At this juncture, the employer may produce evidence rebutting the prima facie case by establishing that the work performed at the new location varies significantly from the work performed at the former plant, establishing that the work performed at the former plant is to be discontinued entirely and not moved to the new location, or establishing that the employer's decision involves a change in the scope and direction of the enterprise. Alternatively, the employer may proffer a defense to show by a preponderance of the evidence: (1) that labor costs (direct and/or indirect) were not a factor in the decision or (2) that even if labor costs were a factor in the decision, the union could not have offered labor cost concessions that could have changed the employer's decision to relocate.
>
> The first prong of the employer's burden is self-explanatory: If the employer shows that labor costs were irrelevant to the decision to relocate unit work, bargaining over the decision will not be required because the decision would not be amenable to resolution through the bargaining process.
>
> Under the second prong, an employer would have no bargaining obligation if it showed that, although labor costs were a consideration in the decision to relocate unit work, it would not remain at the present plant because, for example, the costs for modernization of equipment or environmental controls were greater than any labor cost concessions the union could offer. On the other hand, an employer would have a bargaining obligation if the union could and would offer concessions that approximate, meet, or exceed the anticipated costs or benefits that prompted the relocation decision, since the decision then would be amenable to resolution through the bargaining process.
>
> As an evidentiary matter, an employer might establish that it has no decision bargaining obligation, even without discussing the union's position on concessions, if the wage and benefit costs of the unit employees were already so low that it was clear on the basis of those figures alone that the employees could not make up the difference.[13] In any event, an employer would enhance its chances of establishing this defense by describing its reasons for relocating to the union, fully explaining the underlying cost or benefit considerations, and asking whether the union could offer labor cost reductions that would enable the employer to meet its profit objectives.[14]
>
> Perhaps the most significant differences between the analytical framework we adopt today and those set forth in *Otis Elevator* [269 NLRB 891 (1984)] concern the definition and allocation of the parties respective burdens. We believe our proposed analysis more clearly apprises the parties of their obligations at the bargaining table and in litigation.[15] Further, we believe that we are warranted in placing on the employer the burden of adducing evidence as to its motivation for the relocation decision because it alone, more often than not, is the party in possession of the relevant information. Finally, we believe that our test is most responsive to the central purposes for which the Act was created: promoting labor peace through collective bargaining over those matters suitable for negotiation where there is a general duty to recognize and bargain with a labor organization.[16]
>
> If, under our analysis, the relocation decision is a mandatory subject of bargaining, the employer's obligation will be the usual one of negotiating to agreement or a bona fide impasse.[17] However, we recognize that there may be circumstances under which a relocation decision must be made or implemented expeditiously.[18]

[20] Columbus sponsored R. Exh. 11, which he testified shows that between June 1, 1993, and September 30, 1993, Respondent required 7291 hours less to ship product than would have been required at Dayton.

> If such circumstances are established, the Board will take them into account in determining whether a bargaining impasse has been reached on the relocation question. Accordingly, the extent of the employer's obligation to notify the union and give it an opportunity to bargain will be governed by traditional 8(a)(5) criteria, taking into account any special or emergency circumstances as well as the exigencies of each case.

[13]For example, if a relocation of unit work would save an employer a projected $10.5 million in costs for equipment modernization and environmental controls (quite apart from any labor costs), and if the employer's present labor costs totaled $10 million, then even if the employees were willing to work for free, the union could not offer sufficient labor cost concessions to offset the equipment and environmental savings.

[14]Consistent with the cases decided under *Otis Elevator*, our test announced today will require us to evaluate the factors which actually motivated the employer's relocation decision rather than to engage in a post decisional examination of potential justifications for the decision. In this regard, we agree with the court of appeals' proposition that under *Otis Elevator* and its progeny ''two basic ingredients emerge: the relevant factors must have been contemporaneous with or have predated the decision itself, and the exercise must involve an effort to determine what was actually in the minds of those making the decision.'' 880 F.2d at 1434. These ''basic ingredients'' are implicit in the test we announce today. Thus, in order to successfully rebut the General Counsel's prima facie case, the Respondent must show that the factors it is raising in its defense were relied on at the time the relocation decision was made.

[15]All three of the *Otis Elevator* tests suffer from other serious flaws. As the court of appeals pointed out, the Dotson-Hunter test ''appears to be designed to favor and protect management prerogatives.'' 880 F.2d at 1431. The Zimmerman test goes too far in the opposite direction by requiring bargaining even when labor costs played no part in the employer's decision. As Member Dennis frankly acknowledged, her test is difficult to apply. 269 NLRB at 897.

[16]As a practical matter, the test announced today will encourage and require the employer to evaluate all the factors motivating its relocation decision—when determining whether its course of action should include negotiations with the union.

[17]Of course, it is well established that, under Sec. 8(d) of the Act, an employer's duty to bargain does not include the obligation to agree to a union proposal. *H. K. Porter Co. v. NLRB*, 397 U.S. 99 (1970).

[18]See, e.g., *NLRB v. Transmarine Navigation Corp*., 380 F.2d 933 (9th Cir. 1967) (employer threatened with loss of principal customer due to inadequate facility); *NLRB v. Rapid Bindery*, 293 F.2d 170 (2d Cir. 1961) (same). We cite these cases only as examples of instances where prompt action was necessary. We do not address the question whether the particular relocation decision at issue were, or were not, mandatory subjects of bargaining.

Counsel for the General Counsel argues on brief that here there was a relocation of work without a basic change in the nature of Respondent's operation; that job skills of the employees of Columbus are comparable to those who worked at Respondent's Dayton facility, and all but one of the employees who work at Respondent's Columbus facility formerly worked at its Dayton facility; that the changes in Respondent's operation at Columbus do not constitute a basic change in the nature of Respondent's operation or a change in the scope or direction of the enterprise; that broken down into constituent parts the changes simply involved the consolidation of jobs, the addition of new job duties, and changes in seniority, assignment, and transfer practices; that reorganizing the equipment into cells and the assignment of employees by teams to cells and the assignment of employees by teams to cells involve essentially variations in work methods and do not constitute a change in the scope and direction of Respondent's business; that Respondent has failed to show that it effected any fundamental change in its nature, including changes in its product, the manufacturing process or the technology of production; that while Respondent asserts that labor costs were not a factor in the relocation, an integral part of its plan was the economy gained from the reduction of its work force from a bargaining unit of approximately 43 employees plus supervisors to a combined work force of approximately 16 employees; that the Board in *Dubuque Packing Co*., supra, made clear that the employer's defense including a showing that labor costs both direct and/or indirect were not a factor; that indirect labor costs include manning and staffing, which considerations were integral to Respondent's profitability assurance plan; that the implementation of the ''empowered flexible machinist'' involved job restructuring and elimination of rigid job descriptions that have a clear impact on labor costs; that Respondent's decision to present the profitability assurance plan to the Union is an admission that the decision was amenable to resolution through the bargaining process; that Mr. Columbus was able to point out specific sections of the contract which if changed would have permitted the implementation of the profitability assurance plan; and that had Respondent not cut short the bargaining process through its unilateral implementation of the plan, the parties would have fully explored concessions, and modifications to meet Respondent's needs.

Respondent, on brief, contends that the involved relocation was not a mandatory subject of bargaining because (1) of the significant change in the operations that occurred with he relocation, (2) labor costs were not a factor in the relocation decision, and (3) even if labor costs were a factor, the Union could not have offered sufficient labor cost concessions to change the Company's decision; that ''in order for the Company to survive,'' Respondent's brief page 18, dramatic operational changes were necessary; that labor costs played no part in he Company's plan; that ''on average'' the flexible machinists at Columbus are paid $2.50 an hour more than the machinists at Dayton; and that

> [T]he Company has achieved significant productivity gains, even with the higher labor costs [at Columbus]. These gains, when translated into dollars and cents, compute to savings far exceeding any labor costs that the Union would have been willing to accept. *As evidence shows, direct labor costs have been cut in half as a result of implementing the changes*. [Exh. 11.] [Emphasis added.][21]

In my opinion the General Counsel has established that Respondent's decision was not accompanied by a basic change in the nature of its operation. It still is engaged in the manufacture of the same industrial tools it manufactured at Dayton. It has not changed the manufacturing process or the technology of production. The General Counsel has established prima facie that Respondent's relocation is a mandatory subject of bargaining. Although Respondent commenced utilizing a team and cell approach in Columbus, it utilized the same machinery and the same workers, it made the same products (except for duplications), it has the same suppliers, the same customers, and it utilizes the same sales force it did while it operated in Dayton. Even the sales bro-

[21] R. Br. 19–20.

chure has not changed. As pointed out by the Board in *Noblit Bros*., 305 NLRB 329 fn. 9 (1992), internal changes such as having the employees doing essentially the same work with variations in work methods does not amount to a change in the scope and direction of the enterprise. The work performed in Columbus does not vary significantly from the work formerly performed at Dayton.

Respondent's decision to relocate was motivated by direct and/or indirect labor costs. Its argument that ''on average'' the employees at the Columbus facility receive $2.50 an hour more must be considered in the light of the fact that one-half of the people working at Columbus were formerly supervisors at Dayton and while some of these supervisors are now an the teams some of them are facilitators. In other words, former supervisors who continue to exercise more authority than the involved employees and who in all likelihood are paid more than the machinists were paid at Dayton would raise the average hourly wage at Columbus. Respondent has not shown that direct and/or indirect labor costs were irrelevant to the decision to relocate. It went from a work force of 43 employees plus a number of supervisors to a work force of 15 (excluding Columbus), including 7 who were formerly supervisors at Dayton. As indicated by Respondent on brief, as quoted above, it greatly reduced its direct and/or indirect labor costs.

With respect to Respondent's contention that even if labor costs were a factor, the Union could not have offered sufficient labor cost concessions to change the Company's decision, it is noted that, as set forth above, Columbus during his testimony herein cited specific portions of the involved collective-bargaining agreement which, from Respondent's point of view, caused a problem and he testified that if the Union had made specified concessions the operation could have remained in Dayton. In Columbus' opinion, with these changes the Dayton operation would have been profitable, especially since it was a much less expensive option. In short, the Company admitted herein that it would have remained in Dayton if the Union had made certain concessions.

The relocation decision here is a mandatory subject of bargaining and Respondent is obligated to negotiate to agreement or a bona fide impasse.[22]

But Respondent contends that *Dubuque Packing Co*., supra, does not apply here and it, Respondent, does not have to bargain with respect to discontinuing its manufacturing operations and relocating to Columbus because this is ''covered by'' the involved collective-bargaining agreement; that here the Company's decision to relocate falls squarely within the scope of the above-described management's rights section of the involved agreement; that while in 1965 there was a requirement in that agreement to discuss relocation with the Union prior to relocation, that requirement was negotiated away in 1984, and, therefore, the decision to relocate became an absolute right of the Company; and that the zipper clause in the involved agreement along with the management-rights language and the language in the severance pay provision give the Company the contractual right to make the relocation decision with no duty to bargain before making that decision. Respondent also argues that the Union knowingly and voluntarily waived its right to bargain over matters referred to or covered by the involved agreement; that the 1981 agreement, the changes negotiated in the 1984 agreement and the Union's unsuccessful 1984 and 1987 negotiating proposals establish that the Union waived its right to bargain over relocation; that relocation is specifically covered by the management-rights provisions and the zipper clause closes out any bargaining during the contract term concerning relocation; and that, therefore, the Union waived its right to bargain over the relocation.

On the other hand, the General Counsel argues that when an employer relies on the bargaining history to establish a waiver of the employer's obligation to bargain, the Board, as indicated in *Johnson-Bateman Co*., 295 NLRB 180, 185 (1991), requires evidence that the matter is issue was ''fully discussed and consciously explored during negotiations and the union . . . consciously yielded or clearly and unmistakably waived its interest in the matter''; that Ronto testified that during the 1984 negotiations the Company's chief spokesperson explained that the ''discuss'' language in the management-rights provision was redundant and the Company was required to meet with the Union anyway; that, as the only witness to testify herein as to the negotiations, Ronto demonstrated that there was no conscious relinquishment of the Union's bargaining rights; that the involved management-rights language is ambiguous on its face; that it is not explicit that the rights stated in the involved management-rights clause are, like the rights earlier listed in that clause, exclusively vested in the Company; that while it clear that they are management rights due to their inclusion in the management-rights provision, it is not clear whether they are exclusive or qualified; that as waiver must be clear and unmistakable, the language does not operate to waive the Union's right;[23] that with respect to the involved severance pay language, Ronto testified that during the 1984 negotiations the parties were discussing the possibility of the consolidation of the Dayton and Springfield plant not the closing or relocation of the Dayton plant and the Union did not feel that the language was inconsistent with the obligation to bargain; that as demonstrated by General Counsel's Exhibit 19 and Ronto's testimony, the Company claimed that it proposed the change to be consistent with its other contracts; that the provisions on severance pay merely show that the parties settled in advance certain subjects of ''effects bar-

[22] As noted above, the Board in *Dubuque Packing Co.* acknowledged that there may be circumstances under which a relocation decision must be made or implemented expeditiously. Here, albeit Respondent was looking at other facilities to relocate to in October 1992 it did not announce its plans to the Union until March 4, 1993 and it met once with the Union after that before assertedly reaching a final decision 10 days later to relocate. Respondent took the position that ''[t]ime is the essence'' in its March 4, 1993 presentation. Apparently it wanted to have all in place for the beginning of its fiscal year on June 1, 1993. As far as its treatment of its Dayton employees and their Union is concerned it is not clear to me why if ''[t]ime is of the essence'' in March 1993, the Union was not given the benefit of knowing of Respondent's position that ''time was of the essence'' in October 1992 when Respondent had tentatively decided to relocate. In the circumstances of this case I do not believe that, other than by Respondent's own doing and for its own purposes, the decision had to be made or implemented expeditiously.

[23] The General Counsel submits that Ronto convincingly testified that the aforementioned semicolon, which does not appear in the master, or a printed copy of the involved agreement, was merely a typographical error. I agree.

gaining'' that the involved zipper clause does not appear to preclude voluntary bargaining over any matter covered by the agreement and bargaining would be required by Section 8(a) before the implementation of any changes thereto; that the bargaining history shows that Respondent believed it did not have the right to unilaterally relocated the work as evidenced by its decision to go through at least some of the formalities of bargaining; and that there is nothing in the management-rights clause, severance-pay clause, or zipper clause that affirmatively authorizes Respondent to relocate bargaining unit work without bargaining nor is there any evidence in the parties' bargaining history that would compel such an interpretation.

In my opinion the situation at hand is neither ''covered by'' the involved agreement nor did the Union waive its statutory right to bargain over the subject. With respect to Respondent's ''covered by'' assertions regarding the involved severance pay provision, it is noted that the Board in *Reece Corp*., 294 NLRB 448, 450–451 (1989), as here pertinent, concluded as follows:

> We note that although the . . . severance pay clause refers to a decision to ''close permanently the plant'' . . . [the] . . . clause [does not address] the situation in which production and equipment are not permanently discontinued or sold, but rather are transferred elsewhere. See *Allied Mills*, 218 NLRB 281, 285–286 (1975), enfd. mem. sub nom. *Grain Millers Local 110 v. NLRB*, 543 F.2d 417 (D.C. Cir. 1976), cert. denied 431 U.S. 937 (1977) (clause granting severance pay when production permanently discontinued not a waiver of right to bargain over transfer of production from closed plant).

Obviously, the involved severance language does not speak to the situation at hand; the involved subject was not ''covered by'' this portion of the agreement.

The management-rights language cited by Respondent in its ''covered by'' argument is ambiguous on its face. It is not included in the sentence that indicates that specified rights are exclusively vested in the Company. As pointed out by General Counsel, albeit the language is part of the management-rights clause, it is not clear that such a right is exclusive or qualified. The fact that it was not included or perhaps excluded from the sentence dealing with rights exclusively vested in the Company seemingly indicates that it should be treated differently than those specified rights that were included in the sentence. In my opinion it has not been demonstrated that Respondent specifically reserved the right to unilaterally relocate unit work. In other words, Respondent's conduct in unilaterally relocating unit work is not ''covered by'' the management-rights clause in the involved agreement.

Regarding the involved zipper clause, as noted above, in my opinion the situation at hand is not ''covered by'' either the severance pay or the management-rights clauses in the involved agreement. Although the language of the clause, as here pertinent, reads ''shall not be obligated to bargain collectively with respect to any subject or matter referred to or covered by this Agreement,'' the remainder of such language namely ''referred to'' does not, in my opinion, equate with ''covered by.'' Refer implies deliberate, direct, and open mention of something. Management's right ''to decide . . . to relocate . . . [its plant]'' does not specifically refer to the right of the Company to unilaterally relocate the involved work. It does not specifically refer to the exclusive right of the Company to take such action. Contrary to Respondent's assertions, the situation at hand is not ''covered by'' the involved collective-bargaining agreement.

Did the Union waive its statutory right to bargain over the subject? As pointed out by the court in *Olivetti Office U.S.A., Inc. v. NLRB*, 926 F.2d 181, 187 (2d Cir. 1991)

> At the outset, we note that national labor policy disfavors waivers of statutorily protected rights. *NLRB v. United Technologies Corp*., 884 F.2d 1569, 1575 (2d Cir. 1989); *Chesapeake & Potomac Telephone Co. v. NLRB*, 687 F.2d 633, 636 (2d Cir. 1982). As such, only a ''clear and unmistakable'' waiver will be recognized by the courts. *Metropolitan Edison v. NLRB*, 460 U.S. 693, 708, 103 S.Ct. 1467, 1477, 75 L.Ed.2d 387 (1983); *United Technologies Corp*., 884 F.2d at 1575. Such a waiver may be expressed or implied, see *Metropolitan Edison Co.*, 460 U.S. at 708 n. 12, 103 S.Ct. at 1477 n. 12, and the parties' bargaining history may furnish evidence of an implied waiver. See *United Technologies Corp*., 884 F.2d at 1575. The burden of proving a union waiver rests with the employer.

With respect to bargaining history, the Board stated as follows in *Reece Corp*., supra at 451.

> Bargaining history can establish a waiver only if ''[i]t can be said from an evaluation of the prior negotiations that the matter was 'fully discussed' or 'consciously explored' and that the union 'consciously yielded' or clearly and unmistakenly waived its interest in the matter.'' *Park-Ohio Industries v. NLRB*, 702 F.2d 624, 628 (6th Cir. 1983).

And in *Johnson-Bateman Co*., 295 NLRB 180, 184 (1989), the Board indicated that it ''had repeatedly held that generally worded management rights clauses or 'zipper' clauses will not be construed as waivers of statutory bargaining rights.'' [Footnote omitted.]

With respect to the management-rights clause at page 14 of its brief, Respondent makes the following argument:

> First, previous labor agreements establish that in 1965, when the last sentence was added to the management-rights provision, it was conditioned upon ''discussing'' relocation with the Union prior to implementation. [G.C. Exh. 2, p. D.] This remained unchanged for the next 15 years. [G.C. Exh. 2, pp. E, F, G, H, and 1.] Then, in 1984, the Company negotiated away this condition and, as a result, the decision to relocate became an absolute right of the Company. [R. Exh. 6, p. 1.]

This assertion is not factual. As here pertinent, the involved 1965 agreement reads as follows:

> To decide location of its plant, and to relocate the same; to permanently *discontinue* the conduct of its business and operations. Before final decision to *discontinue* the conduct of its business and operations, the

> Union will be advised and discussions held. [Emphasis added.]

Here we are not dealing with the discontinuing of the conduct of Respondent's business and operations; we are dealing with the unilateral relocation of bargaining unit work. Consequently the subsequent deletion of the language dealing with advise and discuss is not relevant here. Additionally, Respondent did not refute Ronto's testimony, as noted above, that during the 1984 negotiations the Company conceded that other language in the agreement required it, on the request of the Union, to meet and discuss the situation. The Union has not waived its statutory right to bargain regarding the relocation.

As noted above, the involved severance pay language speaks to Respondent deciding, ''to close permanently a plant.'' The Union, by agreeing to this language did not waive its statutory right to bargain regarding the relocation of bargaining unit work.

And finally, the involved zipper clause, for the reasons specified above, does not, in my opinion, speak to the situation at hand. By agreeing to its inclusion in the agreement, the Union did not waive its statutory right to bargain regarding the relocation of bargaining unit work. Additionally the court in *Auto Workers Local 547 v. NLRB*, 765 F.2d 175, 182–183 (D.C. Cir. 1985), made the following observation:

> If relocation is a mandatory subject and it was found either *not* to be contained in the management-rights clause or *not* to be an implied management reserved right, the zipper clause would have prevented the Company from unilaterally deciding to relocate the assembly operation during the term of the contract, even after bargaining to impasse. Although a zipper clause may waive the obligation to bargain over all mandatory subjects during the term of an agreement, it surely does not waive the union's right to object to an employer's taking unilateral action with respect to such subjects. Thus, if an employer is not acting on a claim of right under the contract, or pursuant to a reserved management right inferable from the contract, it may not institute changes with respect to mandatory subjects without the consent of the union.

In its decision, supra at 182 fn. 27, the court pointed out

> The zipper clause contained in the contract was a typical one, in which each party waives the right, and each agrees that the other shall not be obligated, to bargain collectively with respect to any subject or matter referred to or covered in this Agreement, or with respect to any subject or matter not specifically referred to or covered in this Agreement, even though such subject or matter may not have been within the knowledge or contemplation of either or both of the parties at the time they negotiated or signed this Agreement.

It appears that if the transfer of bargaining unit work is referred to but not ''covered'' in the agreement, then under the zipper clause the Union was not obligated to bargain and respondent could not transfer the work without first receiving the Union's consent.

Nothing cited by the Respondent constitutes an express, clear, unequivocal, and unmistakable waiver by the Union of its statutory right to bargain about the involved relocation of bargaining unit work.

In my opinion Respondent failed to satisfy its bargaining obligation. The General Counsel, on brief, contends that the Union needed the information it sought from Respondent so that it, the Union, could verify Respondent's claim of hardship and explain the validity of the request or concessions to the membership; that in the light of the substantial wage increases in the current contract, the Union was skeptical about the claims of economic losses; that the Company advised the Union that the Company had lost money for about 10 years and maintaining the status quo was not an option; that the Union needed the product information to assess Respondent's claim that it could produce approximately 80 percent of the products previously manufactured with only a third of the work force; that Respondent went through the motions of collective bargaining but made the decision to close and relocate even before sitting down at the table with the Union on March 4, 1993; that Respondent had been directly engaged in negotiations for a lease for the Columbus facility in February 1993, prior to negotiations with the Union; that Respondent, with its March 5, 1993 notice, which specified the date that operations would cease in Dayton, demonstrated its hostility towards the bargaining process; that Respondent's failure to provide on request information relevant to negotiations in itself precluded the reaching of impasse; that Respondent engaged in bad-faith bargaining by refusing to provide the information the Union requested and by relocating work from Dayton to Columbus without prior notice to the Union and without affording the Union an opportunity to bargain with respect to that conduct; that Respondent bargained in bad faith during the meetings held on March 4 and 8, 1993, by insisting on its proposal being the only matter on the bargaining table and by demonstrating and unwillingness to consider any alternatives and by failing after March 8, 1993, to make itself available to meet with the Union for the purposes of bargaining with respect to the relocation; that Respondent presented the profitability assurance plan on a ''take it or leave it'' basis; that Columbus did not deny telling Burton on March 14, 1993 that Columbus ''had to do what's on the table'' and it was out of his control; that informing a union of a preexisting decision and commitment to a course of action does not comply with the duty to bargain under Section 8(d) of the Act; that if the employer has no intention of changing its mind, the notice is nothing more than informing the Union of fait accompli; that the Union indicated it was available to meet with Respondent the very first working day after the Union's membership meeting but Dunlevy was not available; that a few days later Respondent finalized the decision to relocate; that even crediting Columbus that Burton was to call him on Tuesday with his Louisville phone number, Burton's failure to call would not give a reasonable person the belief that the Union was completely uninterested in future bargaining; that Columbus' notes of his March 14, 1993 conversation with Burton show that Burton believed they could work out a plan using the contract; and that the Union never had a chance to bargain regarding the relocation.

Respondent, on brief, argues that because it had no duty to bargain over the decision to relocate, it is unnecessary to

determine whether the Company was obligated to provide the requested information; that if there had not been a waiver, the Company was not obligated to demonstrate financial inability since it did not request concessions in wages or fringe benefits; and that the Company informed the Union that it had no way of capturing the requested product information, and it was unable to provide any projections for the next 3 years with regard to its products.

Contrary to Respondent's assertions, as concluded above, Respondent did have an obligation to bargain over the decision to relocate. Its approach, namely, do it our way or we will hit the highway, manifested no real intent to adjust differences. Respondent's approach was basically that the Company does not have to bargain, the Company will not allow meaningful bargaining, and this is the plan, take it or leave it. Such an attitude violates the duty to bargain. This is not hard bargaining such as that described in *Atlanta Hilton Tower*, 14 NLRB 1600 (1984). Rather, here Respondent at the outset peremptorily foreclosed further negotiations.

There are conflicts in the evidence with respect to the availability of Dunlevy, Burton, and Nickell during the week of March 14–20, 1993. It appears that the Union indicated a willingness to meet on Monday, March 15, 1993, or Tuesday, March 16, 1993. Dunlevy was not available at the beginning of the week due to a snowstorm in Pennsylvania. Both Burton and Nickell testified that Dunlevy said that he had other commitments for Wednesday, Thursday, and Friday of that week. Columbus denied this but Dunlevy, who testified herein, did not deny his. Columbus testified that Burton was supposed to get back to him on the morning of Tuesday, March 16, 1993, from Louisville with the telephone number of the Galt House. Columbus also testified that Burton did not call him on the ''15th'' as agreed. Burton was in Dayton on March 15 and 16, 1993. According to his calendar he had a doctor's appointment in Dayton at 9:45 a.m. on March 16, 1993. Columbus testified that he knew that Burton and Nickell were staying at the Galt House in Louisville. During the March 8, 1993 negotiation session Burton indicated that, if necessary, he would skip the Louisville trip. As noted above, Burton testified that he told Columbus either Burton would call him from Louisville and leave a number where Columbus could contact him or if Dunlevy could schedule something, Columbus could call Burton in Louisville and he and Nickell could break away from Louisville and come back to Dayton. Burton did not testify that he did call Columbus with the telephone number and he did not deny Columbus' testimony that such call was never made. It appears that Burton did not telephone Columbus to give him a Louisville telephone number and Columbus, using a telephone information operator, did not telephone Burton at the Galt House indicating that Dunlevy was available and they could meet Wednesday, Thursday, or Friday of that week. As the General Counsel points out, even if Burton was at fault for not calling from Louisville, a reasonable person would not conclude that Burton was completely uninterested in future bargaining, especially in light of Burton's March 14, 1993 comment to Columbus that Burton believed they could work out a plan using the existing contract.

Respondent was insisting on a proposal which, if accepted, would have effectively nullified the Union's ability to act as the employees' collective-bargaining representative. Respondent, among other things, demanded that unit members give up their seniority so that former supervisors could take almost one-half of their remaining jobs after Respondent reduced its work force from 43 employees and a number of supervisors to 16, including Columbus and 7 former supervisors who are now ostensibly machinists.[24] Respondent's demands were concessionary. It advised the Union that it had lost $1 million last year, that it had been losing money for 9 of the last 10 years, and it could not continue in business in Dayton unless it received the concessions it sought. But Respondent had already agreed to a multiyear contract with raises each year. Albeit it now claims that it has been losing money for a number of years, apparently nothing was said regarding this during the negotiations over the current agreement. Respondent's repeated claims that, because of the plant's unprofitability, it needed concessions amounted to an assertion of inability rather than unwillingness. In this light and in light of its assertions that it proposed producing a certain amount of product with the reduced work force, the Union sought the above-described information. The financial and product information sought were relevant and necessary and Respondent was obligated to provide to the Union the information it sought. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152 (1956). Regarding the product information, Respondent claims that it could not provide the information sought. Columbus conceded that some of this information was available. None of it, however, was provided to the Union. The record does not demonstrate that any attempt was made to provide whatever was available to the Union. Respondent's attitude was that the Company did not have to provide any information.

The Board in *Reece Corp*., supra at 453, concluded as follows:

> On the basis of the foregoing facts, we conclude that the Respondent did not reach a bargaining impasse before implementing the work relocation, and therefore it violated Section 8(a)(5) and (1) of the Act. The parties were precluded from reaching a lawful impasse at that point by the Respondent's refusal adequately to respond to the Union's requests for financial information that would make it possible for the Union to evaluate the necessity for the Respondent's demands for large concessions and, thereby, to determine whether it could recommend the demands to the membership with any hope of acceptance.
>
> When requested financial information is relevant to the subject under negotiation, an employer violates Section 8(a)(5) of the Act by refusing to supply it. *NLRB v. Truitt Mfg. Co*., 351 U.S. 149, 152 (1956). Here, as shown above, the Respondent presented its concessionary demands as essential to the continuation of [the involved facility] as a viable component of its overall operations. The Union sought information beyond conclusionary charts and statements that would substantiate the Respondent's position. ''Good-faith bargaining necessarily requires that claims made by either bargainer should be honest claims. . . . If . . . an argu-

[24] As noted above, three of the foreman supervisors are the facilitators for each of Respondent's three cells. The need for testing, other than to justify moving former supervisors into the unit, is questionable in light of the fact, among other things, that the Company did not test its part-time workers until the time of the hearing herein.

> ment is important enough to present in the give and take of bargaining, it is important enough to require some sort of proof of its accuracy.'' Id. at 152–153. See also *Teleprompter Corp. v. NLRB*, 570 F.2d 4, 8–11 (1st Cir. 1977); *Clemson Bros.*, 290 NLRB 944 (1988). By refusing the Union's request, the Respondent violated its obligation to bargain in good faith. Because prior good-faith bargaining is a prerequisite to a lawful impasse, the Respondent's subsequent unilateral implementation of its decision also violated Section 8(a)(5). *Maine & Shipbuilding Workers v. NLRB*, 320 F.2d 615, 621 (3d Cir. 1965); *Taft Broadcasting Co.*, 163 NLRB 475, 478 (1967), petition for review denied sub nom. *Television Artists AFTRA v. NLRB*, 395 F.2d 622 (D.C. Cir. 1968).

Respondent here violated its obligation to bargain in good faith by refusing the Union's request for information. There was no lawful impasse and Respondent's subsequent unilateral action also violated the Act.

The amended complaint alleges as follows:

> Since about March 8, 1993, Respondent . . . has failed and refused to furnish the Union with [financial and product] . . . information requested by it [orally and by letter] [which information is necessary for and relevant to, the Union's performance of its duties as the exclusive collective-bargaining representative of the unit]. . . .
>
> About March 5, 1993, Respondent, by letter, notified the Union of its intent to discontinue its manufacturing operations at its Dayton, Ohio facility and subsequently relocated that operation to Columbus, Ohio . . . without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.
>
> About March 4 and 8, 1993, Respondent and the Union met for the purpose of bargaining about operational changes that were initially proposed by Respondent at a March 4, 1993 meeting [and] . . . [s]ince about March 4, 1993, the Union has requested that Respondent bargain collectively about [these matters].
>
> [Since March 4, 1993] Respondent engaged in the following conduct: (1) failed and refused to provide the Union with the [above-described] information . . . which is necessary for, and relevant to its performance of its collective-bargaining duties; (2) threatened to close its Dayton, Ohio facility if the Union rejected the proposition of having an independent firm screen bargaining unit employees for a limited number of jobs that would come as a result of Respondent's Dayton, Ohio operations being severely curtailed; (3) acted unilaterally in making a decision to relocate its Dayton, Ohio facility to Columbus, Ohio, while simultaneously leading the Union to believe that it was working to bargain about issues that would facilitate a restructuring of the Dayton, Ohio operation; (4) demonstrated an unwillingness to consider any of the Union's proposals relative to its Dayton, Ohio facility being restructured; (5) insisted upon its proposal being the only matter on the bargaining table; and (6) failed after March 8, 1993 to make itself available to meet with the Union for purposes of bargaining about matters that would facilitate the restructuring of Respondent's Dayton, Ohio facility.
>
> By its overall conduct, including the conduct described above, Respondent has failed and refused to bargain in good faith with the Union as the exclusive collective-bargaining representative of the Unit.
>
> And [b]y the conduct described above, Respondent has been failing and refusing to bargain collectively and in good faith with the exclusive collective-bargaining representative in violation of Section 8(a)(1) and (5) of the Act.

Respondent has violated the Act as alleged in the amended complaint as set forth above.[25]

CONCLUSIONS OF LAW

1. Respondent is an employer engaged in commerce within the meaning of Section (6) and (7) of the Act.

2. The Union is a labor organization within the meaning of Section 2(5) of the Act.

3. By or about March 5, 1993, notifying the Union of its, the Company's, intent to discontinue its manufacturing operations at its Dayton, Ohio facility and subsequently relocating that operation to Columbus, Ohio, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct respondent violated Section 8(a)(5) and (1) of the Act.

4. By the following conduct, which occurred since March 4, 1993, Respondent violated Section 8(a)(5) and (1) of the Act:

> (a) failing and refusing to provide the Union with the information which is necessary for, and relevant to its performance of its collective-bargaining duties; (b) threatening to close its Dayton, Ohio facility if the Union rejected the proposition of having an independent firm screen bargaining unit employees for a limited number of jobs that would come as a result of Respondent's Dayton, Ohio operations being severely curtailed; (c) acting unilaterally in making a decision to relocate its Dayton, Ohio facility to Columbus, Ohio, while simultaneously leading the Union to believe that it was working to bargain about issues that would facilitate a restructuring of the Dayton, Ohio operation; (d) demonstrating an unwillingness to consider any of the Union's proposals relative to its Dayton, Ohio facility being restructured; (e) insisting upon its proposal being the only matter on the bargaining table; and (f) failing after March 8, 1993, to make itself available to meet with the Union for purposes of bargaining about matters that would facilitate the restructuring of Respondent's Dayton, Ohio facility.

5. The foregoing unfair labor practices affect commerce within the meaning of Section 2(6) and (7) of the Act.

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[25] Obviously no conclusions are reached herein regarding the merit, or lack thereof, of a self-directed work force where the employees, who are empowered, work on teams with a facilitator and participate in ''gain sharing.'' This case deals strictly with the issues set forth above. It is noted that according to evidence of record, the Union has had experience with a self-directed work force.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices within the meaning of Section 8(a)(5) and (1) of the Act, Respondent shall be ordered to cease and desist therefrom and take certain affirmative action designed to effectuate the policies of the Act.

Regarding the remedy herein, the General Counsel, on brief, contends as follows:

> The usual remedy for failing to bargain about a decision to close a facility and transfer work elsewhere is to order the employer to restore the status quo ante, bargain about the decision and reinstate and make whole the employees who lost jobs as a result of the unlawful conduct. *Reece Corp*., supra at 453 citing *Park-Ohio Industries*, 257 NLRB 413 (1981), enfd. 702 F.2d 624 (6th Cir. 1983). However, the Board will not order restoration of the status quo if such a remedy would be ''unduly burdensome.'' *Lear Siegler, Inc*., 295 NLRB 857 (1989). Counsel for the General Counsel submits that it would not be unduly burdensome in the instant case to order restoration of the status quo. Respondent retains its Dayton, Ohio facility which contains ample space to restore the manufacturing operations. Its sole tenant leases only a portion of the space on a month-to-month basis. Respondent operates in Columbus, Ohio pursuant to a lease with a third year escape clause. (It is likely by the time an ultimate decision is rendered that Respondent will be substantially closer to an ability to exercise its escape rights.) Respondent purchased only one new piece of equipment for the Columbus facility and that was similar to a machine it had previously owned, so it appears the purchase was merely for replacement. As admitted by Columbus, there is no reason why Respondent could not implement a self-directed work force at the Dayton plant.
>
> Respondent's controller, Mike Breh, claimed that it would cost Respondent over 2 million dollars to relocate the plant. Respondent's Exhibit 12 purports to include costs attributable to relocation. It is submitted that only a small portion of these would be incurred. . . . In sum, the costs presented are wildly exaggerated. The holding and intent of the decision in *Lear Siegler*, supra, shows that the Board contemplates a ''two bites'' approach to a restoration remedy, that is the Board may permit Respondent to introduce at the compliance stage evidence relevant to the appropriateness of the restoration remedy. This comports with the Board's usual policy of leaving the details of the remedy to the compliance process. It is conceded that any restoration order may be subject to this caveat. In the event it is found that restoration would be unduly burdensome, it is alternatively requested that the Administrative Law Judge order the reinstatement of Dayton employees to the Columbus facility consistent with the Board's orders in *Roy-Type Division, Triumph-Adler-Royal, Inc*., 298 NLRB 609 (1990) and *Reece Corp*., supra. The Dayton and Columbus facilities are within a reasonable distance of one another.

And Respondent, on brief, contends as follows:

> An order to restore the status quo ante is inappropriate where the plant closing was economically motivated, and reopening of the plant would be unduly burdensome. See *Olivetti Office U.S.A. v. NLRB*, 926 F.2d 181 (2d Cir. 1991); *Triumph-Adler Royal, Inc*., 298 NLRB 609 (1990); *Arrow Automotive Industries*, 284 NLRB No. 57 (1987). [284 NLRB 487.]
>
> Here, it is undisputed that the Company made its decision to close the Dayton plant strictly for the economic reasons brought on by declining business levels. [Tr. p. 258.]
>
> Furthermore, a number of conditions militate against reopening the Dayton plant. Robert Columbus and Mike Breh testified that the production area space in Dayton has been leased by another company; some of the equipment at the Dayton plant was sold; some new equipment had been purchased for the Columbus operations; the Company has signed a three-year lease on the Columbus facility; and, for several years before relocation, the Company has sustained substantial financial losses in excess of three million dollars. [Tr. pp. 223–227, 259, 362–367, R. Exh. 12.]
>
> A requirement that the Company shut down the Columbus operations and reopen the Dayton plant would cost the Company $2,113,447.00. [Tr. pp. 362–367, R. Exh. 12.] Such requirement would be excessively burdensome for a company with sales of only seven million dollars a year. [Footnote omitted.]

Taking the last case cited by Respondent, *Arrow*, supra at 489, it is noted that there the respondent demonstrated that when it decided to close the involved plant in 1981 ''it had been losing money since 1977 had lost over $1 million the previous year, and was losing more money in 1981 because of . . . . [a] strike.'' While here, except for the strike, Respondent's claimed financial plight is seemingly similar to the situation in *Arrow*, supra, here Respondent refused to supply the financial information to the Union. And at the hearing herein it failed to substantiate its claims that it had been losing money at Dayton for a number of years. Evidence of record that Columbus claimed during negotiations that Respondent lost $1 million the year prior to the relocation is credited. In other words, I find that Columbus did make this claim. But once again Respondent failed to substantiate this claim by providing the Union with financial information or introducing financial documentation at the hearing herein. Accordingly, *Arrow*, supra involved a situation different from the one at hand.

Similarly in *Triumph-Adler-Royal*, supra, the administrative law judge was able to find that for several years prior to the relocation, the respondent in that proceeding had sustained substantial financial losses and the relocation itself cost the respondent in excess of $4 million. Also, the Board pointed out in that case that there was a long passage of time since the initial relocation and if respondent were required to return to the original plant it would still be faced with a removal of environmental concerns and the problems which had previously affected its operations at the original plant. Instead of requiring the respondent there to reestablish its original operations, the Board, as here pertinent, ordered the respondent to offer unit employees reinstatement to their former position, at the facilities to which respondent there

unlawfully transferred unit work, making them whole by paying them either what they would have normally earned from the date of their termination to the date of the offer of reinstatement or, for those who do not relocate, until the date they secured substantially equivalent employment with other employers. Even this, however, was not acceptable to the involved circuit court of appeals for, on appeal, the court in *Olivetti*, supra, which was the successor in interest to *Triumph-Adler Royal, Inc*., held as follows, at 189–190:

> Finally, we must review the reasonableness of the Board-ordered remedy. Approaching this issue, we cannot turn a blind eye to the extensive administrative delay by the Board, and we believe that enforcement of the Board's remedy more than six years after the misconduct would truly ''mock reality.'' *Emhart Industries, Hartford Division v. NLRB*, 907 F.2d 372, 380 (2d Cir. 1990).
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> . . . .
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> At this juncture it would be draconian to force the Company—which has experienced a drastic change in its operations and personnel requirements—to comply with the Board's remedy. While we recognize that deterrence is a valid objective of Board-ordered remedies, an order, such as the present one, that becomes ''penal or confiscatory'' because of the Board's delay goes beyond any legitimate remedial purpose of the Act.
>
> We might be expected to remand this case to the Board for further proceedings to impose a proper remedy. In light of the history of this case, however, we do not wish to return the parties to what has been aptly described as ''a new dimension—one where time has little meaning.'' *Emhart Industries*, 907 F.2d at 378 (quoting *House Committee on Government Operations, Delay, Slowness in Decision Making, and the Case Backlog at the National Labor Relations Board*, H.R. Rep. No. 1141, 98th Cong., 2d Section 16 (1984)). It would be a grave injustice to prolong this matter. We therefore exercise our authority under Section 10(e) of the Act to modify the Board's remedy.[4] 29 U.S.C. § 160(e).
>
> As previously stated, the wrong committed here was the refusal to bargain in good faith. The Board's backpay order requires that the Company pay bargaining unit workers back pay for the past six-plus years, and until that point in the future that they are either reinstated or obtain ''substantially equivalent employment.'' This order is unreasonable because it assumes that, had the parties negotiated, those negotiations would have continued for 6 years, and possibly into the future. See *Sure-Tan*, 467 U.S. at 900, 104 S.Ct. at 2813 [''remedy must be sufficiently tailored to expunge only the *actual*, and not merely *speculative*, consequences''] [Emphasis in original.]; cf. *Carpenter Sprinkler*, 605 F.2d at 69 (Board's order not enforced where certain assumptions by the Board regarding the equity of its remedy were incorrect). We agree with the Company that the remedy should be limited to back pay for a reasonable period of time in which the parties should have bargained over the work transfer decision.
>
> . . . .
>
> Finally, reinstatement of all bargaining unit employees is also an unjust remedy here. In the years intervening between the Company's unfair labor practice and the Board's final remedy, the internal structure of the Company has changed to such a degree as to make reinstatement not only unreasonable but unrealistic. See *Fibreboard*, 379 U.S. at 216 and fn. 10, 85 S.Ct. at 406 & fn. 10 (unduly burdensome remedial order should not be enforced).

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[4] We agree with the Board's decision not to order the Company to return its operations to Connecticut as such an order would be unduly burdensome. See. *Fibreboard*, 379 U.S. at 216, & fn. 10, 85 S.Ct. at 406 & fn. 10.

As is obvious, *Olivetti* did not deal with the same situation as the one at hand.

For the reasons specified by General Counsel, as set forth above, I do not believe that it has been demonstrated that it would be unduly burdensome for Respondent to restore the status quo ante to insure meaningful bargaining. Accordingly, Respondent will be ordered to reestablish its manufacturing operations at its Dayton, Ohio facility. It will also be ordered to bargain with the Union with respect to the matters involved in this proceeding and to furnish the Union with the financial and product information it sought in March 1993.

In order to recreate the status quo ante Respondent will be ordered to offer to those unit employees who were terminated when the involved operation was relocated to Columbus immediate and full reinstatement to their former or substantially equivalent positions in Dayton without prejudice to their seniority or other rights, replacing if necessary any former supervisor or employee hired and who was placed in the unit to perform the work previously performed by these employees who were terminated at the Dayton facility when unit work was relocated to Columbus. Respondent should make unit employees who were terminated when Respondent relocated unit work to Columbus whole for any loss of earnings and other benefits suffered by payment to them of a sum of money equal to that which normally would have been earned rom the date of termination to the date of Respondent's offer of reinstatement. Such amounts hall be computed in the manner prescribed in *F. W. Woolworth Co*., 90 NLRB 289 (1950), and shall be reduced by net interim earnings, with interest computed in accordance with *New Horizons for the Retarded*, 283 NLRB 1173 (1987). If there are not a sufficient number of jobs or all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and hereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.

It will further be recommended that Respondent preserve and make available to the Board, or its agents, on request, all payroll records and reports, and all other records necessary and useful to determine the amount of backpay due and rights of reinstatement under the terms of this decision. In addition, Respondent will be directed to post the attached notice.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[26]

ORDER

The Respondent, Elliott Turbomachinery Company, Inc., Dayton and Columbus, Ohio, its agents, successors, and assigns, shall

1. Cease and desist from

(a) Notifying the Union of Respondent's intent to discontinue its manufacturing operations at its Dayton, Ohio facility and subsequently relocating that operation to Columbus, Ohio, without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

(b) Failing and refusing to provide the Union with the financial and product information that is necessary for, and relevant to, its performance of its collective-bargaining duties.

(c) Threatening to close its Dayton, Ohio facility if the Union rejected the proposition of having an independent firm screen bargaining unit employees for a limited number of jobs that would come as a result of Respondent's Dayton, Ohio operations being severely curtailed.

(d) Acting unilaterally in making a decision to relocate its Dayton, Ohio facility to Columbus, Ohio, while simultaneously leading the Union to believe that it was working to bargain about issues that would facilitate a restructuring of the Dayton, Ohio operation.

(e) Demonstrating an unwillingness to consider any of the Union's proposals relative to its Dayton, Ohio facility being restructured.

(f) Insisting on its proposal being the only matter on the bargaining table.

(g) Failing after March 8, 1993, to make itself available to meet with the Union for purposes of bargaining about matters that would facilitate the restructuring of Respondent's Dayton, Ohio facility.

(h) Failing and refusing by its overall conduct, including the conduct described above, to bargain in good faith with the Union as the exclusive collective-bargaining representative of the unit.

(i) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Reestablish its manufacturing operations at its Dayton, Ohio facility.

(b) Bargain with the Union with respect to the matters involved in the proceeding and to furnish the Union with the financial and product information it sought in March 1993.

(c) Offer to those unit employees who were terminated when the involved operation was relocated to Columbus, Ohio, immediate and full reinstatement to their former or substantially equivalent positions in Dayton, Ohio, without prejudice to their seniority or other rights, replacing if necessary any former supervisors or employees hired and who was placed in the unit to perform the work previously performed by those unit employees who were terminated the Dayton, Ohio facility when unit work was relocated to Columbus and make unit employees who were terminated when Respondent relocated unit work to Columbus whole for any loss of earnings and other benefits suffered in the manner set forth in the remedy section of this decision. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, the Respondent shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement shall be allowed a reasonable period of time for accepting such offers.

(d) Preserve and, on request, make available to the Board or its agents, for examination and copying, all payroll records, social security payment records, timecards, personnel records and reports, and all other records necessary to analyze the amount of backpay due under the terms of this Order.

(e) Post at its Dayton and Columbus, Ohio facilities, copies of the attached notice marked ''Appendix D.''[27] Copies of the notice, on forms provided by the Regional Director for Region 9, after being duly signed by Respondent's authorized representative, shall be posted by it immediately upon receipt thereof, in conspicuous places, including all places where notices to employees are customarily posted. Reasonable steps shall be taken by respondent to insure that said notices are not altered, defaced, or covered by any other material. Respondent will also mail a copy of the notice to employees who were terminated at Dayton, Ohio when the bargaining unit work was transferred to Columbus, Ohio.

(f) Notify the Regional Director in writing within 20 days from the date of this Order what steps the Respondent has taken to comply.

[26] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[27] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading ''Posted by Order of the National Labor Relations Board'' shall read ''Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board.''

APPENDIX A

UNION PRESENTATION

MARCH 4, 1993

OPENING—CHUCK DUNLEVY

During the presentation by Joe Smith on February 19, he pointed out the severity of the financial position of our Dayton manufacturing operations. Elliott Management has made it clear that it is no longer acceptable for the Dayton operation to lose money. As a result, a plan must be prepared and presented to Elliott Management which guarantees acceptable levels of profitability beginning this June (the first month of the new fiscal year) if the Dayton plant is to remain open.

During his presentation, Joe asked for your input and suggestions as to how we might make the operation profitable. We thank all of those who took the time to put their ideas

in writing or took the time to tell Joe personally what they felt should be done. We have spent many hours exploring ideas on how to improve our performance and profitability.

As we consider these ideas, it is apparent that there are three options:

1. Stay here and do nothing.
2. Make the necessary changes to make this operation profitable.
3. Close the facility.

One is not an option that we can consider. Elliott Management has made that clear. We must develop a plan to make this operation profitable beginning in June of this year. Current business levels and methods of operation provide no hope for profitability in the near future.

Option two—to make the necessary changes to make the operation profitable—is where most of our efforts have been spent in the past months. As Joe pointed out in his presentation, ''If we are still here in six months, we will be a totally different company.'' This statement became shockingly clear as we considered the vast, company-wide changes needed to make this dramatic turnaround a reality. The required levels of change far exceed any and all initial expectations.

Option three involves closing the Tuttle Avenue manufacturing operations. This was initially considered to be the most extreme circumstance, and therefore the last to be considered. However, given the extensive and severe changes required to return to profitability, it could very well be the only viable alternative. As a result, it is our intention to inform you today of the Company's tentative decision to discontinue manufacturing operations at the Tuttle Avenue location in sixty (60) days. In his way, if we are unsuccessful in agreeing upon a plan for the operation, you will be informed of our intentions.

While the size of our operation does not require us to comply with Federal WARN Laws, it is our intent to give 60 days notice. Letters to all employees and State/Local agencies as required by WARN, will be sent in the near future.

Now, we would like to share with you the nature of change required to return the Ohio Operation to profitability and keep the plant in Dayton. This represents the current basis for the profitability Assurance Plan which has been presented to Elliott management. Our efforts in the coming days will be to enhance his plan while determining if there is a basis for agreement with the Union. While we are announcing a tentative decision to lose, we want to earnestly explore the possibility of keeping manufacturing here at this location. This can only be done if agreement can be reached on the dramatic level of change that will assure future profitability regardless of fluctuating business conditions. This will also require significant change in many provisions of our current Labor Agreement.

Before we begin this presentation, I must ask you to do several things. We know that you may not like what you are about to see or hear. However, if we are to be successful, you must leave here with a clear understanding of exactly what we are proposing. We therefore ask that you view this presentation as if we are beginning a new business. You must try to keep an open mind about what we are proposing and why we are proposing it. Try not to view it in light of how things are done today. It will not make sense from that standpoint. If you become defensive with any single point, you will not be able to properly understand subsequent points.

Once we have completed our presentation, we will answer any clarification questions. Once your clarification questions have been answered, we will set a date for our next meeting and then adjourn to give you a chance to discuss our proposal.

Before we proceed, do you have any questions on what has been covered to this point? It is important to us that you ask about anything that you do not understand or are unsure of.

Let's look at our plan.

APPENDIX B

PRESENTATION TO UNION

MARCH 4, 1993

PRESENTER DUNLEVY

CLOSING REMARKS

I would like to summarize what we have discussed today so that we have an understanding for our next meeting. This will also serve as one final opportunity for you to ask any clarification questions that you may have.

Point 1. We have announced to you the Company's tentative decision to close the Dayton Manufacturing operations.

Point 2. We have explained the dramatic change required in our method of operation to return to profitability regardless of Business levels. We are offering you the opportunity to accept these changes and to identify other changes- conditions of equal or greater benefit, in an effort to keep manufacturing operations here.

Point 3. In the absence of mutual agreement in the coming days, we have informed you of the Company's decision to provide 60 day notification of the closing of manufacturing operations to all Industrial Tool Division employees.

I know today has been tough. But, the market conditions are tough. There is very little indication that any aspect of todays' Tube Tool or Burnishing markets are going to improve in the near future. We must become more competitive and more aggressive if we are to survive.

The plan that was presented today is one that must be made if we are to survive as a company. While this plan represents dramatically fewer jobs than today, it provides the opportunity to survive as a viable, competitive company and it provides the opportunity for future growth and future jobs. We would like for that opportunity to exist here. We hope you will focus on that future potential as we work together in the coming days to determine the future of the Industrial Tool Division.

You must understand that we are not looking for concessions in wages or fringes. However, we do need major changes in the Contract language. Also, realize that the key elements of our plan are solid. We cannot negotiate away from this plan. If you cannot accept this plan, then do not come back with 100 points to bargain away from the plan. Time is of the essence. We must not waste time on matters that are not supportive of our efforts to return to profitability.

Are there any other questions before we discuss the date for our next meeting?

Velmer, can we meet again Monday the 8th?

APPENDIX C

Direct Labor People	335
Indirect Labor People	7
TOTAL	42

COLUMBUS PLANT COSTS

Relocation Mach/Invent	$56,704

BUILDING PREP.

Electric	$27,000
Air Compressor	$5,000

COLUMBUS RENT FROM JAN. 94—APRIL 96

Jan. 94—April 95	$72,800
May 1, 1995—April 96	$58,500
Early Termination Penalty	$25,000
TOTAL	$156,300
COLUMBUS COST	$245,004

DAYTON PLANT COSTS

BUILDING PREP.

Electric	$27,000
Air Compressor	$7,500
TOTAL	$34,500
Loss of Rental Income	$14,000
Capital Equip. Replacement Costs	$90,000
DAYTON COSTS	$138,500

LABOR COSTS

WAGES

Direct Labor People	$952,952
Indirect Labor People	$190,590
TOTAL	$1,143,542
One Week Lost Absorbtion During Relocation	$37,977

FRINGES

Group Insurance	$234,565
Comp. Insurance	$22,496
Social Security	$90,093
Unemployment	$21,500
Pension	$5,010
Employee Savings Plan	$10,442
TOTAL	$384,106
Terminate Current Columbus People	($119,000)
Fringe Benefits	($39,971)
Outside Service	($52,000)
Severance	($4,577)
TOTAL	($206,394)
Severance/Vacation/Etc.	$219,272

FISCAL 1993

Rework	$78,430
Scrap	$143,598
TOTAL	$222,028

FISCAL 1994

Rework	$14,006
Scrap	$56,582
TOTAL	$70,588
IMPACT	**$151,440**
TOTAL COST IMPACT	**$2,113,447**

APPENDIX D

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

WE WILL NOT notify Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC of our intent to discontinue manufacturing operations at our Dayton, Ohio facility and subsequently relocate that operation without prior notice to the Union and without affording the Union an opportunity to bargain with Respondent with respect to this conduct.

WE WILL NOT fail and refuse to provide Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC with the financial and product information which is necessary for, and relevant to its performance of its collective-bargaining duties.

WE WILL NOT threaten to close our Dayton, Ohio facility if Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC rejects the proposition of having an independent firm screen bargaining unit employees for a limited number of jobs that would come as a result of our Dayton, Ohio operations being severely curtailed.

WE WILL NOT act unilaterally in making a decision to relocate our Dayton, Ohio facility while simultaneously leading Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC to believe that we are working to bargain about issues that would facilitate a restructuring of the Dayton, Ohio operation.

WE WILL NOT demonstrate an unwillingness to consider any of the proposals of Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC relative to our Dayton, Ohio facility being restructured.

WE WILL NOT insist on our proposal being the only matter at the bargaining table.

WE WILL NOT fail to make ourselves available to meet with Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC for purposes of bargaining about matters that

would facilitate the restructuring of Respondent's Dayton, Ohio facility.

WE WILL NOT fail and refuse to bargain in good faith with Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC as the exclusive collective-bargaining representative of the unit.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL reestablish our manufacturing operations at our Dayton, Ohio facility.

WE WILL bargain with Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC with respect to the matters involved in this proceeding and will furnish to Local Lodge 225, District Lodge 34 of the International Association of Machinists and Aerospace Workers, AFL–CIO–CLC the financial and product information it sought in March 1993.

WE WILL offer to those unit employees who were terminated when the involved operation was relocated to Columbus, Ohio, immediate and full reinstatement to their former or substantially equivalent positions in Dayton, Ohio, without prejudice to their seniority or other rights, replacing if necessary any former supervisors or employees hired and placed in the unit to perform the work previously performed by those unit employees who were terminated the Dayton, Ohio facility when unit work was relocated to Columbus and WE WILL make unit employees who were terminated when we relocated unit work to Columbus whole for any loss of earnings and other benefits suffered. If there are not a sufficient number of jobs for all the employees to be offered reinstatement, then we shall place the names of those for whom jobs are not available on a preferential list in the order of their seniority, and thereafter offer them reinstatement before other persons are hired. Employees offered reinstatement will be allowed a reasonable period of time for accepting such offers.

ELLIOTT TURBOMACHINERY COMPANY, INC.